M'Buruku v Republic (Criminal Appeal E018 of 2023)
[2025] KEHC 12835 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12835 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E018 OF 2023

AK NDUNG'U, J

SEPTEMBER 18, 2025

BETWEEN

ANTHONY MUNGANIA M'BURUKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the conviction and the sentence in S.O Case No. E074 of 2019, Hon. Vincent Masivo (SRM) on 10.2.2023)

JUDGMENT

1. The Appellant was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 1st December 2018 and 12th September 2019 within Oldonyiro township in Isiolo County of the Eastern Region, intentionally caused his penis to penetrate the vagina of PL also known as SN a child aged 16 years.

2. He was tried and convicted a sentence of 15 years imprisonment passed against him on the 10th February 2023.

3. Aggrieved by the conviction and sentence, the Appellant lodged this appeal premised on the following amended grounds;

    1. That, the trial magistrate erred in law and fact by failing to find that there was a jealousy between the appellant and the school head teacher hence the present case is fabricated.

    2. That, the trial magistrate erred in law and fact by failing to consider that the medical evidence was inclusive (sic) and the elements of the offence were not proved beyond any reasonable doubt.

3. That, the trial magistrate erred in law and fact by failing to appreciate that there was contradiction and discrepancies in prosecution case hence my conviction is not safe.

4. That, the trial magistrate erred in law and fact by rejecting my defence without a cogent reason to do so.

5. That, the sentence imposed is truly long.

4. The appeal was canvassed by way of written submissions.

5. The Appellant who appeared in person submitted that as held by the Court of Appeal in Eliud Waweru v Republic [2019] eKLR, sexual offences cases are being used for vendetta and for extortion. That the evidence in this matter was surrounded in mystery, misinformation, incredible evidence, more suspicions and doubtful speculations.

6. Further that the age, penetration and identity were not proved. He urges that the prosecution relied on evidence of pregnancy yet a DNA test was not undertaken. On the question of the age of the complainant, it is submitted that an age assessment was not done. The appellant submits that there was material contradiction in the evidence adduced. He raises concern with the name(s) of the complainant. He adds that the date of the offence and the age of the pregnancy do not tally. Finally, he submits that his defence was not considered.

7. Counsel for the prosecution in rejoinder submitted that the issue of names is settled by the application of Section 137(d) of the Criminal Procedure Code. That in the amended charge, the use of an alias cured any clarity issues on name of the complainant.

8. On the question whether the Appellant was convicted on a withdrawn Count, it is submitted that the correct amended charge was read to the Appellant and he pleaded to the same. No objection was raised at trial as envisaged under Section 382 of the Criminal Procedure Code and in any event, any error was curable under that section.

9. It is submitted that age was proved through production of a birth certificate and thus there was no need for an age assessment. Further that penetration was proved through the evidencePW1 and corroborated by PW6 and there was admission to PW2, PW4 and PW5 by the Appellant over the pregnancy. On contradictions, it is submitted that inconsistencies must go to the root of the charges as no 2 witnesses will perceive and remember the facts the exact same way.

10. Counsel submits that the defence did not raise doubts in the prosecution's case and the Appellant did not produce any evidence to support that he had reported the head teacher to the CSO.

11. On sentence, it is submitted that the sentence was lawful and lenient.

12. I have had occasion to consider the evidence as recorded at the trial court. In so doing, I have taken cognizance that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses testify and have given due allowance for that fact. I have applied my mind to the submissions on record and case law cited. Lastly, I have taken into account the applicable law.

13. The general issue for determination is whether the prosecution proved all the ingredients of defilement the threshold set in law.

14. The appropriate point of departure in this voyage is the affirmation of the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt. Based on the evidence presented both by the prosecution and the defence a conviction lies if upon evaluation of such evidence, the guilt of an accused person is the only rational inference and

where the possibility of any other inference abounds thus casting doubts on the prosecution's case, then the benefit of doubts arising thereat must go to the accused.

15. In Ozaki and another v The State, the Supreme Court of Nigeria held that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In Uganda v Sebyala& Others, Case No. 130 of 1988 the court stated:

> " The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts."

16. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi. Once an accused person discharges the evidential burden of adducing evidence of alibi, it's the duty of the prosecution to disprove it. The duty of the curt is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favour of the accused. (See OrteseYanor& Others v The State [1965] N.M.L.R. 337.

17. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove the alibi or any other evidence that he may adduce beyond that of introducing the evidence or alibi. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability or otherwise of the accused.

18. Section 8 of the *Sexual Offences Act* provides as follows:

    (1) 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.

    (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

    (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

19. It is now trite that for the accused to be convicted of the offence of defilement, certain ingredients must be proved. 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. See the case of Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013, where it was stated that:

> " The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant."

20. In the case of Kaingu Elias Kasomo v Republic Malindi the Court of Appeal in criminal appeal No. 504 of 2010 stated as follows:

> " Age of the victim of the 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."

21. This position was reaffirmed in Alfayo Gombe Okello v Republic [2010] eKLR where the Court stated that:

> " In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

22. In Dominic Kibet v Republic Criminal Appeal No. 155 of 2011 it was held that:

> " ...while the Court may in certain circumstances rely on evidence other than an age assessment report, the onus of proving the age of the victim resides with the prosecution and a simple statement by the complainant as to their age does not in my view constitute such proof."

23. In the case of Francis Omuroni v Uganda, Court of Appeal in Criminal Appeal No. 2 of 2000, it was observed as follows:

> " 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..."

24. In Chipala v Rep. [1993] 16 (2) MLR 498 the Malawian High Court held at 499 that:

> " It seems to me that other than a certificate of a medical practitioner, or his oral testimony, to the effect that, in his opinion, such a person has or has not attained a specified age, or other documentary proof, or the testimony of a person who has personal knowledge gained at the time of such person's birth, such as parents, no other evidence is receivable as proof of the age of such a person."

25. As regards the age of the complainant, the fact of her age was proved through her birth certificate produced. Contrary to the submission by the Appellant, age assessment was not necessary by dint of Section 26(4) of the Birth and Deaths Registration Act which stipulates that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any other proof of such entry. The concern over the identity of the complainant is readily answered by the fact that the amended charge sheet recognized the alias name of the complainant and it was clear to the Appellant that the Complainant was using both names, that is PL also known as SN.

26. On the question of penetration, section 2 of the *Sexual Offences Act* defines "penetration" as:

> "the partial or complete insertion of the genital organs of a person into the genital organs of another person."

27. The evidence of PW1 is that she had engaged severally in sexual intercourse with the Appellant. The Appellant was her boyfriend and a teacher at Raban Sheikh Primary school. She was 16 years old at the time and in primary school in class 6 going to 7. It was her evidence that she got pregnant. She informed one Macharia and Esther about the pregnancy. She also informed her mother. The matter was reported at Ngaringiro Police Station. A pregnancy test at Isiolo County Referral Hospital revealed she was 3 months and 5 days pregnant. Medical documents were produced.

28. This evidence is corroborated by the medical evidence that confirmed the pregnancy. This court while addressing similar facts as in this case where pregnancy was the basis of prove of penetration held in Nanyuki HCCRA No. E069 of 2023 as follows;

> " In the circumstances of this case and in other similar cases where the prosecution's case on defilement is based on facts that reveal a long cohabitation and sexual relation complete with the birth of a child, it would be an absurdity to expect medical evidence to reveal any of the expected findings of a freshly broken hymen, tears on the labia majora, labia minora, lacerations, presence of spermatozoa (unless there is sexual activity shortly before examination) etc at the genetalia.
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> It would be a second absurdity to expect evidence of sensory details where the sexual intercourse is habitual.
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> In such circumstances resort must be had to the victim's evidence and other evidence as clearly put in Bassita v Uganda.
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> The evidence of PW1 was that she had a long term relationship with the appellant with 2 continuos periods of cohabitation between January 2022 to March 2022 and again from October 2022 to 23/12/22. Out of the union, she testified that she got a child a fact confirmed by the evidence of PW2 and PwW4. PW3 too corroborates this evidence and indeed was there on the material night when PW1 was chased away when the appellant came with another woman.
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> In his investigation, PW4 confirmed the cohabitation and when he was taken to the subject house by PW1, he found the appellant in the house with another woman.
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> In my considered view, there is direct evidence of PW1 of penetration by the appellant and which evidence is corroborated by the circumstantial evidence of the long cohabitation of the appellant and PW1 as confirmed by PW3 and the investigations by PW4".

29. In the instant case PW1 was categorical that it was through several sexual intercourse encounters with the Appellant that she got pregnant. This evidence is given credence and corroboration by the evidence of PW5, the father of the complainant who testified that the Appellant approached him seeking to have the matter which had been reported at the police station withdrawn. The evidence is circumstantially supported by the evidence of PW7 who testified that, as he followed up on investigations in the matter and upon the complainant having failed to return on the agreed date for purposes of the filling of a P3 form, he went to the home of the Appellant where he found the complainant sitting on the Appellant's bed. This is a confirmation of the relationship between the Appellant and the complainant.

30. In countering this evidence, the Appellant in an unsworn statement avers that he was framed by a head teacher who feared that he would take his position. The head teacher had vowed to have him sacked.

31. I have evaluated the defence vis-à-vis the prosecution's evidence. Am alive to the fact that the accused has no duty to prove his innocence and that his duty is limited to showing that a reasonable doubt exists in the prosecution's case. This would ordinarily be achieved through puncturing the prosecution

evidence through cross examination of witnesses and highlighting inconsistencies or weaknesses in their testimony and further, if placed on his defence, by presenting own evidence to offer a different version of events.

32. The allegation of a grudge against the appellant that is put forth in his defence by the Appellant is, in my considered view, too remotely related to the offence in the sense that the said head teacher is not a complainant in the matter and there exists no close nexus or relationship with the complainant that would create the possibility of the head teacher colluding with the complainant to frame the Appellant.

33. There is no contest that the complainant got pregnant. It is incomprehensible that the complainant got pregnant by another person, the alleged head teacher who is not even related to her sought her out and her parent (PW5) and a conspiracy was set in motion to frame the Appellant. In light of the evidence of PW1, PW5 and PW7, this line of defence cannot possibly be true.

34. I have pored through the evidence at the trial court. The court correctly appreciated the admissibility and probative value of the evidence of PW5 to the effect that the Appellant acknowledged the pregnancy and indeed sought to have the matter withdrawn from the police. The trial magistrate stated;

> " PW2, a sub-chief, received a report that the complainant run away from school and was found impregnated by the accused person, a teacher. PW4 was a head teacher at Ralph Primary School where the complainant was schooling. He corroborated PW2 testimony. That the complainant went missing from school and was found pregnant. In a meeting, whose in attending were PW2, the complainant's father, the accused person and himself, the accused person admitted responsibility for the pregnancy. PW5 – was a father to the complainant, who testified that the accused person admitted responsibility to the pregnancy of her daughter and asked to have the complaint withdrawn with the police. This evidence went largely unchallenged by the accused person. I find PW2, 4 and 5 testimonies credible that the accused person admitted reasonability to impregnating the complainant, corroborating the complainant testimony further. In my humble view, this amounts to extra judicial confession. The confession is corroborated by other prosecution evidence as discussed above. In Republic v Nicholas Ngugi Bagwa [2015] eKLR. Lesit J held thus:
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> ''45. In my view there are other confession which are also extra judicial confessions if made to any person other than a person in a position of authority and in the ordinary day life. Such confession will be admissible under Section 26 of the *Evidence Act* if made voluntarily without any inducement or force of any kind.....
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> 46. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra judicial confession, in the Indian case of State of Rajasthan v Raja Ram [2003] 8 SCC 180], the court stated that such a statement should:
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> i. It should be made voluntarily and should be truthful.
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> ii. It should inspire confidence.
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> iii. An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

iv. For an extra judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

v. Such statement essentially has to be proved like any other fact and in accordance with law.''

35. I cannot agree more. The totality of the evidence on record leaves no doubt in the prosecution's case. The defence offered is an escapist one that falls far short of dislodging the prosecution's evidence.

36. The Appellant's submission that the failure to conduct a DNA test meant that the case was not proved beyond reasonable doubt goes against the established legal threshold for the prove of penetration. In Kathurima v Republic (Criminal Appeal 26 of 2017) [2023] KECA 1594 (KLR) (10 November 2023) the court of appeal stated;

> " We have carefully considered the record of appeal judgments of both the trial and the first appellate court and the rival submissions set out above, in light of this Court's mandate. One of the complaints by the appellant is that the element of penetration was not established by the prosecution. He submitted that no DNA test was conducted to link him to the offence. The appellant argued that the evidence of an absent hymen alone cannot conclusively determine that the complainant was defiled. We agree with the appellant in that regard. However, medical evidence is not the only proof of penetration in defilement cases. The element of penetration can be proved by the testimony of the complainant. This court has severally held that what is most important to prove the allegation of rape or defilement is not medical evidence but the oral evidence tendered by the victim. In the case of Kassim Ali v Republic [2006] eKLR this Court observed as follows:
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> "So the absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by oral evidence of a victim of rape or circumstantial evidence."

37. On the submission that there were material contradictions in the evidence of witnesses, the legal position is that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions ought to be ignored. In my view, the correct approach is to read the evidence tendered holistically. I have read through the evidence and I find no material contradictions in the evidence adduced.

38. The Appellant challenged the sentence on the basis that the same was truly long.

39. The Appellant was sentenced to 15 years imprisonment as provided in law. Sentencing is at the discretion of the trial court unless shown that the trial court considered irrelevant matters or failed to consider relevant matters or that the sentence in the circumstances of the case is manifestly excessive.

40. In an elaborate ruling on sentencing, the court made reference to the relevant sentence provided in law and made all necessary considerations including application of Section 333(2) of the Criminal Procedure Code. I however note that the trial court did not explicitly indicate that the sentence was to run from the 23/3/22 when the Appellant's bond was cancelled. There appears therefore no grounds

upon which to interfere with the discretion of the sentencing court save to provide clarity on the period from which the sentence is to run in line with Section 333(2) of the Criminal Procedure Code.

41. In the circumstances the appeal against conviction fails and is dismissed. In respect of the sentence, the appeal is successful to the extent aforesaid. I affirm the sentence but with a rider that the same is to run from 23/3/22.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF SEPTEMBER, 2025.

A.K. NDUNG'U

JUDGE