



**Muthui v Republic (Criminal Appeal 037 of 2021)  
[2023] KEHC 2072 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2072 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL APPEAL 037 OF 2021  
F WANGARI, J  
MARCH 17, 2023**

**BETWEEN**

**PETER SAVALI MUTHUI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. I.G Rubu (R.M) in Mwingi SO Case No. 10 of 2020)*

**JUDGMENT**

**Background**

1. 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](#). Particulars of offence that on 22<sup>nd</sup> March 2020, at (withheld) within Mwingi Central Subcounty within Kitui County, intentionally caused his penis to penetrate the vagina of WMM a child aged 16 years.
2. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#). Particulars of offence are that on 22<sup>nd</sup> March 2020, at (withheld) within Mwingi Central Subcounty within Kitui County, intentionally touched the vagina of WMM a child aged 16 years with his penis.
3. The appellant was convicted in the main charge and was sentenced to serve imprisonment period of 15 years. Having been dissatisfied with the judgment, conviction and the sentence imposed the appellant lodged this appeal. This being the first appellate court, I am guided by the principles as set in the case of *Ganpat v State of Haryana*, as cited by Mativo J in [Makau v Republic](#) as hereunder;
  - a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.



- b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
  - c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
  - d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
4. Also in *Okeno v Republic* and *Kiilu & ano v Republic*, the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.

### **Summary of evidence**

5. The complainant (PW 2), gave evidence that she was a class 8 student. On the material date, she was on her way to church when she met the accused who was known to her. He requested her to accompany him. She said she accompanied him out of fear. They first went to a bush where they had sex. They stayed there till night time when they crossed the river Tana using a boat. She gave evidence how they spent the rest of the night in the bush and they had sex. Eventually, after hiking a lift, they went to Kiritiri where the accused used to work.
6. In the meantime, the mother to the complainant, MJM (PW1) gave evidence that she realized that the daughter was not in church. Her daughter did not return home that night. She started searching for her. She was informed that she was last seen with the accused person. Her disappearance was reported to the police. She sought the assistance of Peter Muema Muita (PW3) to help in searching for the daughter.
7. Peter left for Kiritiri and he stayed there for 3 days as he tried to trace the whereabouts of the accused and the complainant. On 27/3/2020, He found them after a tip off. He was assisted by members of public to restrain the accused so that he could not run away. The mother to the complainant was called and she met the accused and her daughter at Kiritiri police station. They were later transferred to Mwingi police station.
8. The complainant was taken to hospital for examination. Dr. Ramla Amin, PW4 examined the complainant. She produced the P3 form and the treatment notes. The complainant's hymen was missing but she had no vaginal bruises. These confirmed that she had been exposed to sexual intercourse. P.C Safi Barre (PW 5), the investigating officer gave evidence how the disappearance of the complainant was reported at the police station, and how she was traced to Kiritiri. After the accused and the complainant were brought to Mwingi police station, she recorded witness statements, caused the complainant to be taken to hospital for examination and eventually charged the accused with this offence.
9. In his defence, the accused who said he was 22 years old, said he was at his place of work when Peter called him and said he wanted to meet him. He gave Peter directions, and when he appeared, he was with the complainant. Suddenly, Peter raised an alarm, and the members of public arrested him. He denied defiling the complaint and was not even aware that the complainant had disappeared from home.



10. After considering the entire evidence on record, the honorable magistrate found the accused person guilty of the main count and he sentenced him to serve the statutory minimum sentence of 15-year imprisonment term.

### **Grounds of appeal**

11. Being dissatisfied with the judgment and the sentence, the appellant lodged an appeal on grounds as hereunder;
  - a. The trial magistrate erred in matters of law and fact by admitting contradicting evidence
  - b. The trial magistrate erred in matters of law and facts in imposing a cruel and harsh sentence to the appellant
  - c. The trial magistrate erred in matters of law and facts in failing to consider that essential witnesses were not bonded
  - d. The trial magistrate erred in law and facts in failing to give reasons of dismissing the defence of alibi.

The state was directed to put in its written submissions by 27/1/2023. At the time of writing the judgment, the submissions had not been filed.

### **Appellant's submissions**

12. In his submissions, the appellant admitted that he had a sexual affair with the complainant. He stated that the complainant was behaving like an adult and he has never seen her in uniform to indicate that she was a minor. Further, he submitted that the court denied him the opportunity to challenge the evidence of the complainant. He also had a grudge with the complainant's mother for she had failed to pay him his salary, and when she learnt of the love affair between the accused and her daughter, he reported the matter to the police.

### **Issues for determination**

13. The issues arising from this appeal are;
  - a. Whether the elements of the offence of defilement were proved
  - b. Whether the defence of alibi was proved

### **Whether the elements of the offence of defilement have been proved**

14. On the first issue, sections 8 (1) and 8(4) of the *Sexual Offences Act*, under which the main charge is founded provides as follows: -
  - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  - (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.



15. The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and identification of the perpetrator. The age of a victim in a case of defilement is crucial because under Section 8 of the *Sexual Offences Act*, age determines the sentence. It must therefore be proved to the satisfaction of the court. It cannot be gainsaid that the prosecution must prove all the three elements.

### **Age of the complainant**

16. A copy of birth certificate in respect to the complainant was produced as an exhibit. The complainant was born on 6/5/2003, making her 17 years, 10 months as at the time of alleged offence. This was not disputed. The age element was proved.

### **Proof of penetration**

17. Section 2(1) of the *Sexual Offences Act* defines penetration as:

“The partial or complete insertion of the genital organs of a person into the genital organ of another person.”

18. The doctor gave evidence that the complainant’s hymen was missing. There were no injuries noted, hence the conclusion that the complainant had been exposed to sexual intercourse. The P3 form and treatment notes were also produced in support. I find that the element of penetration was proved.

### **Identification of the assailant**

19. On the issue of identification, it is trite that the best evidence of identification is that of recognition as was held by the Court of Appeal in *Francis Muchiri Joseph – v Republic* [2014] eKLR where it stated that: - “In *Lesarau v R*, 1988 KLR 783, this court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name....”
20. The identity of the appellant could not be mistaken as the appellant was known to the complainant. The accused was a neighbour to the complainant. Even though the accused during trial denied defiling the complainant, in his submissions, he admitted to having sexual affair with the complainant, but he defended his actions by stating that he believed the complainant was an adult as she behaved like one. The identity of the offender is therefore not in doubt.

### **Whether the defence of alibi was proved**

21. The appellant first raised the defence of alibi during the defence hearing. The burden of proof does not shift to the appellant to prove his alibi defence. The prosecution had the burden of disproving the alibi and proving its case against the accused person. However, the evidence by the prosecution witnesses placing the accused at the scene of crime is overwhelming. I find that the evidence adduced against the appellant on the offence of defilement was proved beyond reasonable doubt.

### **Sentencing**

22. On sentence, Section 8 (4) of the *S.O.A* states as hereunder;

“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’.



23. In *Mainigi & 5 others v DPP & ano*, Odunga J. in holding that the mandatory minimum sentences in S.O.A are unconstitutional stated as hereunder;

“To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*’.

24. The appellant was sentenced to a minimum imprisonment term of 15 years. The court is therefore bound to re-examine the sentence in the light of the above. The accused in his submissions stated that he did not know that the complainant was a minor when he had sexual intercourse with her. He was 22 years old at the time of commission of the offence. The complainant was only 2 months away from turning 18 years, which is the age of majority. The accused did not use that line of defence, but raising it at the appeals stage. The defence cannot discharge the accused from the conviction as I find this to be an afterthought.

25. However, I have perused through the probation officer’s report dated 31/5/2021. It is indicated that the accused and the complainant had a secret love affair for months. The accused was oblivious of the fact that he was committing an offence since the complainant was a minor. Save for the complainant’s family, the community had nothing against the accused. He had no criminal records.

### **Conclusion**

26. I have re-evaluated the evidence on record and I am satisfied that the prosecution proved the elements of the offence of defilement. The appellant was therefore properly convicted and sentenced. The appeal on conviction therefore fails, and proceed to uphold the conviction by the trial court. In respect to the sentence imposed, the trial magistrate was tied by the minimum sentence imposed in the S.O.A. The same having been held to be unconstitutional, the application for revision of the sentence must succeed.

27. I am guided by the Sentencing Guidelines. The evidence on record shows that the complaint had previous penetration. That does not warrant the accused to defile the complainant. The complainant was 2 months’ shy of turning 18 years old, she had not attained the age of majority to give consent to a sexual encounter. She was still a minor and is under the protection of the law. If the accused had raised the defence that he was under the believe that the complainant was an adult, maybe the outcome of the case would have been differect. Nevertheless, the time spent in custody by the appellant must have been a lesson learnt.

28. The sentence of 15 years’ imprisonment is therefore substituted with an imprisonment term of 3 years. The time spent in custody shall be deemed to form part of the sentence, that is with effect from 27/3/2020, the date of arrest. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Pauline Mwaniki S.C for State

Appellant present



Guyo, Court Assistant

