



REPUBLIC OF KENYA



**Mutua v Republic (Criminal Appeal E039 of 2022)  
[2023] KEHC 17610 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17610 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E039 OF 2022**

**GMA DULU, J**

**MAY 11, 2023**

**BETWEEN**

**JOHN NZIOKI MUTUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case No. 1  
of 2018 by Hon. Khapoya S. Benson (PM) at Taveta Law Courts)*

**JUDGMENT**

1. The appellant was charged in the Magistrate's Court at Taveta with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on December 25, 2017 at around 20:00 hours within Taita Taveta County unlawfully and intentionally caused his penis to penetrate the vagina of ANM (name withheld) a child aged 13 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and at the same place unlawfully and intentionally touched the vagina of ANM a child aged 13 years with his penis.
3. He denied both charges. After a full trial, he was convicted on the main count of defilement and sentenced to 20 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, relying on the following amended grounds of appeal:-
  1. The trial Magistrate erred in law and fact by failing to appreciate that the competency of PW1 to testify was not tested since she was not subjected to voire dire examination.
  2. The learned trial Magistrate erred by failing to find that the appellant's identification was not positively established.



3. The learned Magistrate erred by failing to find that the appellant was framed with the commission of the offence as was evidenced by the investigating officer in her evidence in chief.
  4. The trial Magistrate erred by failing to appreciate that the appellant's fundamental rights and freedom were violated.
  5. The trial Magistrate erred by failing to appreciate that penetration was not proved to have occurred as required in law.
  6. The trial Magistrate erred by failing to appreciate that the provisions of section 200 of the Criminal Procedure Code were not adhered to since the appellant was not informed of his right to recall witnesses and as such the appellant suffered prejudice.
  7. The sentence imposed was harsh and excessive since it was applied in mandatory terms as provided in statute without considering the appellant's mitigation or the unique circumstances and facts of the case.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions.
  6. This being a first appeal, I have to be guided by the legal principle that I have a duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences on whether I will affirm the trial court's findings – *Okeno v Republic* [1972] EA 32.
  7. In evaluating the evidence also I have to bear in mind that in criminal cases, the burden is always on the prosecution to prove each element of an offence beyond any reasonable doubt. An accused person has no burden to prove his innocence – see *Woolmington v DPP* [1935] AC 462 and *J. Sawe v Republic* [2003] eKLR.
  8. The elements of the offence of defilement are firstly, the age of the alleged victim who should be below 18 years. Second element is penetration of a sexual nature, even if partial. The third element is the identity of the culprit.
  9. The appellant has raised technical as well as substantive grounds of appeal.
  10. The appellant has first of all complained that voir dire examination was not done on the alleged victim PW1 before testifying in court as required under section 19 of the Oaths and Statutory Declaration Act (cap.19).
  11. Having perused the trial court record, I find that indeed, voir-dire examination was not done for PW1 Alice Mutuku Kioko. However, she was said to be 14 years old and was thus not a child of tender years in terms of section 2 of the Children Act of 2001 which refers to 10 years of age. There was thus no strict legal requirement for conducting voir dire examination, though some courts have subjected children under the age of 18 years to such voir-dire examination. I dismiss that ground.
  12. The appellant has complained that section 200 of the Criminal Procedure Code (cap.75) was not complied with, when another Magistrate took over the conduct of the trial. In this regard, section 200(3) provides as follows:-
 

‘200(3) Where a succeeding Magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding Magistrate shall inform the accused person of that right.’



13. The above provision of the law is concluded in mandatory terms. In the present case when B. S. Khapoya (PM) took over the hearing of the case from G. K. Kimanga (RM) who had taken evidence from some prosecution witnesses, this mandatory provision of the law was not complied with. The trial court proceedings and conviction thus became defective on that technicality and the appeal would succeed on that account.
14. If I allowed the appeal only on the above account, I would have to consider ordering a retrial. However, there are other substantive reasons why the appeal will succeed.
15. With regard to the age of the victim PW1, the same was not proved beyond reasonable doubt. The only evidence on the age of PW1 was her testimony that she was a Class 4 pupil in [*particulars withheld*]. It is the trial court before evidence was tendered by PW1, which recorded that she was aged 14 which was not backed by the evidence of PW1.
16. The other evidence on the age of PW1 was that of PW2 PKM who said that PW1 was aged about 14 years by April. The date and year of birth was however not given, nor was any documentary evidence relied upon regarding the age of PW1. I thus find that the prosecution did not prove the age of PW1 the alleged victim beyond reasonable doubt.
17. With regard to penetration of a sexual nature, PW1 stated that she was sexually penetrated that night. This evidence is corroborated by the evidence of PW4 Peterson Mwapulu a Clinical Officer at Taveta Sub County hospital who stated that medical examination of PW1 revealed freshly broken hymen, lacerations and dry blood stains. I find that the prosecution proved beyond reasonable doubt that sexual penetration did occur on the victim PW1 as alleged in the charge sheet.
18. I now turn to the third element, of the identity of the culprit. In my view the prosecution did not prove that the appellant was the culprit because of contradictory evidence regarding the identity of the perpetrator, tendered by the investigating officer PW3 PC Faith Nguru who stated and maintained even in cross-examination, that she had been informed by an aunt of the victim that the perpetrator was another person who was a friend of PW2. I also note on this element that, though PW2 testified that they sought PW1 that night by going to the house where she was alleged to have entered, they never called neighbours in the estate during that search, to assist in the search or even informed neighbours of the disappearance of PW1.
19. In the circumstances of this case therefore, it cannot be said with certainty that the appellant was positively identified as the perpetrator or culprit as there is serious doubt as to whether he was the culprit.
20. Consequently, I find merits in the appeal. I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MAY, 2023 IN OPEN COURT AT VOI.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Appellant

Mr. Sirima for state

Mr. Otolu court assistant

