



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mutua v Republic (Criminal Appeal 19 of 2016)
[2023] KEHC 23892 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 19 OF 2016**

RK LIMO, J

OCTOBER 18, 2023

BETWEEN

WAMBUA MUTUA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement of the Chief Magistrate Court
at Kitui by A.S. LESOOTLA (SRM) dated 28th November, 2022)*

JUDGMENT

1. Wambua Mutua, the appellant herein, was charged with the offence of defilement Contrary to Section 8(1) (2) of the *Sexual Offence Act* No. 3 of 2006 vide Kitui CM's Court Sexual Offence Case No. 37 of 2011. The particulars were that on 5th day of October, 2011 at Ngovu Village, Yatta Location, Lower Yatta District within Kitui County, he intentionally caused his penis to penetrate the vagina of L.P. (name withheld, a child aged 5 years.)
2. He also faced an alternative charge of committing an indecent act with a child but that is not relevant to this appeal because he was convicted on the main charge.
3. Before I take a look at the grounds raised in this appeal, I will lay out a summary of the evidence tendered at the trial court and the decision rendered thereon.
4. HM (PW1) the mother to the victim testified and informed the court that her daughter (L.P) was aged 5 years and was at pre-school at [particulars withheld] Primary School. She recalled that on the material day (5/10/2022) she had gone to church at around 4:00PM leaving her five-year-old daughter with the grandmother and that when she returned at around 7PM, she found her daughter crying claiming that the appellant who was their casual worker then had defiled her after promising her that he would buy her bread and sweets. The mother further testified that she checked at her daughter's private part and noticed a tear and some blood. She further stated that there was some discharge and the private



part appeared swollen. She stated that she called her husband who called the Area Chief who in turn mobilized Community Policing Unit to arrest the appellant. The mother identified during trial the pant and the skirt her daughter was wearing at the time.

She further added that she later in company of others took the appellant to Kyusiani Police Station before taking her daughter for medical checkup and treatment at Kitui District Hospital.

5. MM (PW2) a ten-year-old sister to the victim testified that on the material day, at around 5PM, she reached home after school and heard the Complainant (L.P) crying from the kitchen and on reaching there, she found her naked with the appellant who had removed his trousers. She testified that she saw her sister's skirt, blouse and pants on the floor, which she identified in court during the hearing. She stated that the appellant was sitting on a jerician with the victim bending in front of him. She stated that the appellant was shocked to see him and when she looked at the victim she observed some wet stuff on her legs. She stated that, she later informed her brother and mother of what she had witnessed when they arrived home that evening.

6. L.P. (PW3) the Complainant in the case testified that she was a nursery school going child she told the trial court that she knew the appellant well because he was an employee at their home. She recalled an incident where she stated that the appellant "did bad manners" to her. She stated that the appellant removed her clothes including her pant and blouse before he removed his own trousers.

According to the child, the appellant then put his penis on her vagina and told her not to tell anyone about it promising to buy her a loaf of bread and sweets. The child identified her clothes in court adding that the appellant stepped on them during the ordeal as she cried in pain. She stated that the appellant defiled her in the kitchen, adding that, her sister M (PW2) found the appellant in the act adding that the appellant sat on a jerician and held her from her back. She testified that she was later taken to Kyusyani Police Station where she narrated the incident before she was taken to hospital for treatment.

7. Dr. Patrick Mutuku (PW6) a medical officer from Kitui District Hospital testified and recalled seeing a patient (Complainant) on 6/10/2011 at Kitui District Hospital. She clarified that the girl had initially been attended to at Yatta Health Centre. He testified that he examined the victim and filled the P3 Form which he tendered as P Ex 4(b). He stated that he noted a tear on the private part of the girl which in his view, proved that there was penetration. He also tendered treatment card from Yatta Health Centre as P Ex 4(a) and Age assessment as P Ex 5. He also tendered PRC Form as P Ex5(c).

8. When placed on his defence, the appellant stated that he was employed as a herder by the victim's parents and that he was arrested on the material day at around 7PM and taken to Kyusani Police Post. He was non-committal about the commission of the offence but stated that he was paid his salary regularly by his employer.

9. The trial court assessed the evidence tendered. The trial found that the evidence tendered against the appellant proved beyond doubt that he committed the offence and convicted him sentencing him to serve life imprisonment.

10. The appellant was aggrieved by the conviction and raised the following ground in his petition of appeal namely;

- i. That he was not allowed to cross-examination the Complainant through an intermediary.
- ii. That the trial court erred by not considering that the case against him was a frame up due to salary he claimed from his employer.
- iii. That the evidence tendered was not corroborated.



- iv. That he was not supplied with statement to prepare for his defence.
11. In his written submissions, the appellant introduced another new ground against the sentence claiming that the same was too harsh.
- He however never sought leave to rely on the new additional ground pursuant to Section 350(b) of the *Criminal Procedure Code*.
12. He further contends that the age of the complainant was not proved because there was no birth certificate or a clinical card tendered to prove her age. He submits that the age of the complainant was not ascertained and that to that extent, the sentence meted out was not supported by evidence.
13. He also contends that the element of penetration was not proved. He submits that the evidence of PW2 needed corroboration because she was a child aged 10 years and in his view, her evidence could not corroborate the evidence of the Complainant (PW3) who was a child too.
- He contends that the evidence of PW6 did not offer corroboration to the element of penetration because there was no lab test made to confirm the presence of pus cells adding that, the hymen was not torn. In his view, the absence of spermatozoa and the fact that the hymen was not broken, there was no conclusive evidence of penetration. He submits that the doctor's opinion on penetration was not supported by evidence tendered has relied on the case of *Arthur Mshila Manga versus Republic* [2016] eKLR, to support his contention.
14. The appellant also contends that he was not accorded a fair hearing by the prosecution to supply him with documents and statements. He also submits that he was entitled to legal representation but was not accorded one.
15. The Respondent through the Office of the Director of Public Prosecution has responded to this appeal vide written submissions by M/s Pauline Mwaniki, the Prosecuting Counsel. The State contends that it proved through evidence tendered, all the ingredients of the offence upon which the appellant was charged and convicted.
16. On the age of the victim, the State points out that the charge indicates the age as 5 years and that the mother to the victim (PW1) testified that her daughter was 5 years old at the time. It also relies on the age assessment report tendered as Exb 5 which indicated that the minor was 5 years old.
17. On penetration, the Respondent contends that the Complainant clearly testified on how she was defiled adding that her evidence was corroborated by PW2 who reached home to find the Complainant crying from the kitchen. The State submits that the appellant was caught in the act and that the medical evidence (P3 Form, PRC & treatment notes) proved the element of penetration beyond doubt.
18. On identification, the Respondent submits that the appellant was employed by the victim's parents on a salary of Kshs. 2,000 per month. It further points out that the incident occurred during daylight and therefore there was no chance for mistaken identity.
19. The State however, concedes to the appellant's claim that he was not accorded a fair hearing because the record does not show that he was supplied with witness statements. The state also submits that the appellant asked for limited questions during cross-examination which in their view can be construed to mean he was not prepared for trial and was therefore prejudiced. To that extent, the Respondent concedes to this appeal stating that although all the ingredients were proved, the appellant was not accorded a fair trial in their view.



20. This Court has considered this appeal and the response made. The mandate of this Court at this stage is to re-evaluate the evidence tendered and reach own conclusion having in mind that it did not have the benefit of observing the demeanor of witnesses as they testified unlike the trial court.
21. This appeal has raised two issues for determination by this court which are: -
- i. Whether the Prosecution's Case are proved to the required standard in law.
 - ii. Whether the appellant was accorded a fair trial.

Whether the Prosecution's Case proved to the required standard.

22. The appellant as observed above was charged with the offence of defilement contrary to Section 8 (i) as read with 8(2) of the *Sexual Offence Act*. As correctly put by the Respondent, the Prosecution was required by law in light of the nature of the offence to establish and prove the following elements namely;
- a. Age of the victim
 - b. Penetration
 - c. Identity of the perpetrator
23. On the question of age, contrary to the appellant's assertion, that element was well established and proved beyond doubt. The charge sheet indicated that the victim was aged 5 years. The evidence of the mother indicates that her daughter was aged 5 years and at pre-school level at Ngovu Primary School.
24. This court has perused through the age assessment report (P ex 5) tendered by PW6 and it shows that the child was 5 years old. So while the P3 Form indicates the P3 Form indicates that she was 6 years old, this court finds that the minor inconsistency on age is insignificant and does not in any way lessen the probative value of the evidence tendered by the mother (PW1) and the doctor (PW6) that the minor was 5 years old.
- In any event, even if the child was found to be 6 years old, the sentence meted out would still have remained the same because the life sentence is prescribed by law under (Section 8(2) of *Sexual Offence Act*) on anyone defiling a child aged 11 years and below.
25. This court finds that the element of age was well established and proved to the required standard and the trial court reached the correct conclusion in that regard.
26. On the question of penetration, this court finds that the evidence presented by the Prosecution established beyond doubt that penetration or at least partial penetration occurred. The evidence of Complainant (PW2) was vivid in what happened to her. The appellant, who was a worker in the homestead appears to have taken advantage of being alone with the minor at the time to commit the offence by removing her clothes including her pant before lowering his trouser and committed the act while sitting on a jerican. PW2, a girl aged 10 years corroborated the evidence of the Complainant by describing in detail how she found at the scene. This is how she described;

“L.P. was naked and the accused had removed his trouser.....accused was sitting on a jerican and was in front of the appellant bowing in front (sic)....when accused saw me, he was shocked and stopped defiling L.P.....(sic)I saw L.P. with some wet staff on the legs.....”. Looking at the choice of the verb “bowing” by the trial court perhaps the right word should have been “bending” and the adjective “shocked” could have been



“frightened” to capture the real state of affairs at that moment. But what is clear is that the appellant was caught in the act by the Complainant’s ten-year-old sister.

27. This Court finds that the above evidence clearly indicates that there was penetration and this is clearly corroborated by the medical evidence given by the doctor Mutuku (PW6) who stated that he examined the victim and noted “a tear on the posterior side of her private parts.” The doctor concluded that the victim was defiled and that the presence of a tear was indicative that someone attempted to penetrate the minor. Penetration, as correctly put by the appellant in his written submissions going by the provisions of Section 2 of *Sexual Offence Act*, means partial or complete insertion of the genital organs into the organs of another person. It is immaterial therefore, whether the hymen is broken or remain intact after the act. What is critical is whether there is partial or complete penetration.
28. This court upon re-evaluation of the evidence tendered by the prosecution and finds that the element of penetration was positive and the trial court was correct, to reach that conclusion.
29. This Court finds that the element of identification was not challenged and is not challenged in this appeal. The appellant was a worker at the victim’s home and was well known to the victim and other family members.
30. The Prosecution’s Case in respect to establishing and proving all the essential elements of defilement was watertight and satisfied the threshold required to found a conviction.
31. The appellant has raised an issue regarding a fair trial alleging that he was not supplied with the statements or accorded legal representation and though the Respondent concedes to the same, this court’s finding is to the contrary. This court has gone through the proceedings of the trial and finds that the appellant at no stage raised the issue of statements or documents or legal representation.
32. In my view it may amount to a travesty of justice to assume that because the proceedings do not show that a trial court ordered or directed the prosecution to supply proceedings, the accused never got the proceedings and therefore, there was a mistrial or violation of the rights of an accused to a fair trial. An Appellant must demonstrate clearly how his rights were violated.
33. The appellant in my view was well prepared in the trial and posed question in cross-examination which were well answered by witnesses. I am not convinced by the Respondent’s contention that the appellant asked limited questions during cross-examination. He heard the witnesses well. The language used is indicated as Kiswahili and he did not state and has not stated in this appeal that he is not conversant with Kiswahili. In the contrary he has always maintained in this appeal that he understands Kiswahili well and that is how this court at the appellate stage has been communicating with him.
34. The issue of having been exposed to unfair trial cannot arise at this stage and I find that the issue of lack of statement and legal representation is belated and is an afterthought. The appellant possibly upon realization of the magnitude of what he had done looked for any escape route and saw a window in the claim of unfair trial. This Court does not buy it. The appellant as a matter of fact in his final oral submissions asked for leniency from this court stating that he had reformed. He is asking for a second chance because he is guilty of what he did to that 5-year-old child.
35. This court finds that the Prosecution’s Case against the appellant was simply overwhelming. It proved beyond doubt that the appellant committed the offence. There is no evidence that he asked for the statements and documents from the prosecution and was denied and/or asked for legal representation and denied. The fact that he was unrepresented during the trial on its own does not mean that his right to a fair trial was breached.



36. I am however, minded to relook at the sentence meted out against him given that he was a young man aged 18 years and was a first offender. Life imprisonment though prescribed by law was a bit harsh and I will intervene in that regard.

In the premises the appeal on conviction fails. The conviction is upheld but the sentence is revised from life imprisonment to 35 years' imprisonment. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT KITUI THIS 18TH DAY OF OCTOBER, 2023.

HON. JUSTICE R. LIMO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

