



**Muthoka v Republic (Criminal Appeal 13 of 2019)
[2023] KEHC 23910 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 13 OF 2019
RK LIMO, J
OCTOBER 16, 2023**

BETWEEN

PAUL MUTUA MUTHOKA APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Paul Mutua Muthoka, the appellant herein was charged with three counts of attempted defilement contrary to Section 9(1) as read with subsection 9 (2) of the *Sexual Offence Act* No. 3 of 2006 *vide* Kitui Chief Magistrate’s Court Sexual Offence Case No. 45 of 2016. The particulars of the 3 counts were as follows: -
 - a. In Count I, the particulars were that on the 25th September, 2016 at around 8PM within Kitui County, he attempted to cause his penis to penetrate the vagina of FT(name withheld) a child aged 9 years.
 - b. In Count II, the particulars were that on the same day, time and location he unlawfully attempted to cause his penis to penetrate the vagina of MK (name withheld) a child aged 8 years.
 - c. In Count III, the particulars are that the appellant also on the same day, time and location unlawfully attempted to cause his penis to penetrate the vagina of JJ (name withheld) a child aged 8 years.

In all the 3 counts, the appellant also faced alternative charge of indecent act with a child Contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006.



2. The appellant denied committing the offences in all the counts but after trial, he was found guilty of the alternative count of attempted defilement in all the three counts and convicted to serve 10 years' imprisonment in each with all the sentences running concurrently.
3. The appellant felt aggrieved and lodged this appeal but before I consider the grounds raised, I will consider the evidence adduced at the trial court and the basis of his conviction.
4. The 1st Complainant FT (PW1) testified that on 25th September, 2016 at around 8PM, she was playing "hide and seek" games together with her 2 friends who were MK and JJ second and third Complainants respectively in the 2nd and 3rd Counts. She stated that as she hid behind one Kavutha's home, the appellant joined them and gave them sweets and sat on a wooden chair and directed to remove her pant and sit on him.
5. The girl stated that she obeyed and removed her pant to the thighs and sat on the appellant who had also removed his trouser to the thighs as well. The girl testified that the appellant was in the process of inserting his penis on vagina when one V (PW2) appeared and the appellant ran off. She added that her friends had also removed their underwear as directed. She testified that she left for home and found her mother furious after being informed by V of what had happened and that her mother beat her up. She testified that the following day she was taken to hospital and got examined by the doctor. She stated that she knew the appellant well and had severally seen him collecting mangoes.
6. VT (PW2) a boy aged 11 years recalled that on 25.09.2016 he went home after selling vegetables at a kiosk. He testified that, upon arriving home, he went to find out where the other kids were as it was late and that he went to look for them at Kavutha's hotel and found the appellant whom he knew very well on his knees with his trousers lowered to his knees with the 2nd Complainant (name withheld) who had her dress raised. The boy testified that the appellant was defiling her and he rushed back to inform his mother namely TK who told him to go and get the girls. He testified that he found the girls on the way but the appellant had fled.
7. JKK (PW3) a businessman from [Particulars withheld] Village, [Particulars withheld] Location testified that he was in his shop on 25th September, 2016 at around 8PM when VT (PW2) went running to his shop and informed him that he had caught the appellant with complaints with their clothes removed. He stated that he asked V, the reportee to lead him to the scene which he did. He testified that when they reached the scene, the appellant saw them and he fled leaving the 3 children who were naked behind. He testified that the following day he reported the incident and the appellant (whom he knew well as he used to buy mangoes) was arrested.
8. MK (PW4), the 2nd Complainant, a girl aged 10 years, testified on oath that on the material day and hour, she was playing with 2 friends together with the appellant near a kiosk. She testified that it is the appellant who joined them while they were playing and bought them chewing gums known as Geneta. The girl testified that the appellant went inside the kiosk and squatted and told F.T (the 1st complainant) to sit on him. According to the girl, the appellant removed his trousers and inserted his penis on the 1st Complainant's vagina and called JJ (the 3rd Complainant) and did the same thing. She testified that she also went and sat on his laps and he inserted his penis on her vagina and he was doing so VT (PW2) appeared and ran out on finding out what was going on. She stated that the appellant also took off.

She testified that, her parents went and talked to one of the victims and reported the matter the following day at the police station before they were taken to hospital for medical examinations.
9. JJ (PW5), the 3rd Complainant testified and corroborated the evidence of PW1 and PW4. She stated that she was playing with the said two girls at around 8PM on the material date when the appellant



- asked them to remove their clothes. She testified that she asked them if they had tasted something sweet and when they answered in the negative, the appellant squatted and asked them to sit on him in turns. According to JJ (3rd Complainant), FT (the 1st Complainant) was the first to sit on the Appellant facing him and that after “doing bad manners” to her, he asked her to sit on him as well and that he did the same “bad things” on her. She testified that VT (PW2) found them out and they ran out. She testified that her parents were informed of what had happened and they were taken to the Police Station the following day before being taken to hospital for medical examination. She added that she knew the appellant well as he used to sell mangoes.
10. Albanus Kioko Mutisya (PW6) a Clinical Officer based at Inyuu Health Centre testified and told the trial court that 3 victims, the Complainants herein were taken to the clinic together with MK 2nd Complainant (PW4) in respect to the 2nd Count, being the first to be presented. According to the medical officer, examination revealed attempted defilement. He tendered P3 as P Ex 1 and PRC Form as P Ex 2.
 11. He testified that FT (1st Complainant (PW1) whom he inadvertently referred to as “R”, was examined on 3rd October, 2016 and the conclusion of the medical examination was indecent act. He tendered P3 Form as P Ex4 which Form clearly shows the correct name, FT (1st Complainant in respect to 1st Count). He also tendered PRC Form as P Ex 5 and Health Card as P Ex 6.
 12. He also testified that he examined JJ (the 3rd Complainant) (PW5) and also formed the opinion that the girl was indecently assaulted. He tendered a P3 Form in respect to J.J. as Exhibit 7, PRC Form as P. Ex8 and Health Card as Exhibit 9.
 13. The Medical Officer testified that in all the three cases, there was no evidence of penetration because the hymen was intact and there was no presence of spermatozoa. He therefore, concluded that there was either attempted defilement or indecent act which was performed on the three minors.
 14. Chief Inspector Humphrey Naktare (PW8) the Investigating Officer in the case testified and basically told the trial court of the action taken when the parents of the 3 girls reported the incident on 27th September, 2016. He testified that he recorded statements from the witnesses and preferred charges of defilement against the appellant adding that he later sought to substitute the charges to attempted defilement.
 15. When placed on his defence, the appellant stated that he sells mangoes and oranges and that on 26/09/2016 he was in [Particulars withheld], at a place called Kasungoni looking for ripe oranges to buy. He testified that as he was going round buying mangoes when he was arrested and taken to Zombe Police Station. He denied committing the offence and blamed Joshua Kula for fixing him due to business rivalry.
 16. The trial court evaluated the evidence tendered and found that the prosecution had established and proved the minors’ ages and found that the prosecution’s case had proved that the appellant committed the offence of indecent act with the minors Contrary to Section 11(1) of the *Sexual Offence Act*. The trial court found that the testimonies of the minors were consistent and believable and that it showed that the appellant’s actions were that of a pervert out to derive pleasure by sexually manipulating the minors. The trial court found that the appellant was also positively identified because he used to deal with mangoes a fact that he himself conceded to in his defence. It was on that basis that the appellant was convicted.
 17. The appellant was dissatisfied with the findings of the trial court and he filed this appeal raising the following grounds namely: -



- i. That the trial court erred by not considering that the evidence of the minors was not corroborated.
 - ii. That the Learned Magistrate erred in convicting him relying on the evidence of the Investigating Officer which evidence in his view could not sustain a conviction.
 - iii. That the learned magistrate erred by convicting him without bearing in mind that the arresting officer was not called to testify.
 - iv. That the medical evidence relied on was insufficient to sustain a conviction.
 - v. That the trial magistrate relied on hearsay evidence.
 - vi. That his defence was overlooked.
18. In his written submissions the appellant has raised new additional grounds but without leave of this Court contrary to Section 350 (b)(iv) of the [Criminal Procedure Code](#).
- The additional new grounds having been raised without leave are found to be improper and incompetent.
19. He submits that the charge sheet was defective but has failed to disclose the defect so even if I was to consider that ground on merit, I would not have found any merit on it because the charge sheet was not defective because it disclosed that an offence of a sexual nature had been committed and the provisions of Section 186 of the [Criminal Procedure Code](#) cure the defect in respect to the description of an offence relating to defilement.
20. The appellant also submits that the trial court failed to conduct voire dire examination on the 3 minors before taking their evidence. Again this ground lacks any basis because the record of proceedings from the trial court reveal that the trial court duly conducted voire dire examination before taking the evidence of the minors.
21. This Court further finds that the appellant was granted an opportunity to cross-examine the minors who gave unsworn statements and he duly cross-examined them. He therefore, suffered no prejudice contrary to what he alleges.
22. On the question of proof, the appellant has poked holes in the prosecution's case. He contends that PW1 testified that he was in the process of defiling her when they were found out and that the appellant ran off after being found out. The appellant poses the question that if he was defiling the 1st Complainant and ran away after being found out, when did he defile the other two?
23. The appellant further submits that the prosecution's case had discrepancies pointing out that PW6 stated that the complainant by the name RT was taken for medical examination on 3rd October, 2016 and contends that there was no complainant by that name adding that there were no reasons given why the Complainant was taken for medical check-up 3 days after the incident.
24. He further submits that there was nothing to show that PW6 was the author of the medical documents tendered contending that PW6 simply stated that he was based at Inyuu Health Centre but did not clarify whether he authored or signed the medical evidence tendered. He submits that in the absence of such clarity the trial court should not have admitted the evidence but should have insisted on the author of the same.



25. The appellant contends that the Prosecution's case was riddled with inconsistencies pointing out that the evidence of PW2 contradicted that PW1 in the sense that PW1 testified that PW2 found them in the act while PW2 stated that he found the appellant having fled.
26. That appellant submits that he should have been given the benefit of doubt that arise from contradictions by the prosecution's witnesses.
27. He contends that the sentence is too harsh and excessive.
28. The Respondent on the other hand has opposed this appeal through written submissions by Learned Counsel Pauline Mwaniki.
29. The Respondent submits that it proved its case at the trial beyond reasonable doubt and points out that the appellant lured his victims with promise of sweets before asking them to undress and sit on him. The state has laid emphasis on the evidence of PW1, PW4 & PW5 who were the victims/complainants in the case.
30. The Respondent contends that all the complainants knew the appellant well as a person who used to collect mangoes. The state further submits that all the witnesses gave corroborative testimonies against the appellant adding that the medical examination revealed no injuries on the victims because the appellant never completed the act of penetration.
31. The State supports the trial court's finding and conviction of the appellant on the alternative charge because there was no evidence to sustain the main charges.
32. It faults the appellant for bringing up the issue of legal representation at this stage when he never requested for any legal representation during trial. The State contends that the appellants fully and meaningfully participated during his trial by extensively cross examining witnesses.
33. The State further submits that failure by the trial court to inform the appellant of his right to legal representation is insufficient to nullify the entire case adding that the provisions of Article 50(2) (h) is not coached in mandatory terms.
34. On sentence, the Respondent contends that the appellant is serving a legal sentence which in its view is commensurate with the offences committed.
35. This court has considered this appeal and the response made. I have already delved onto some of grounds raised by the appellant. As I have pointed out above some of the grounds raised like the issue of legal representation have been raised improperly at submissions stage without leave of this court as stipulated under Section 350(b) of the *Criminal Procedure Code*. This court will only consider grounds properly and competently raised in the Petition of Appeal herein.
36. The main issue for determination in this appeal is whether the prosecution's case was proved beyond reasonable doubt.
37. The appellant though charged with main count of attempted defilements was convicted on the alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offence Act*.
38. This court has re-evaluated the evidence tendered by the Prosecution with a view to reaching its own conclusion.
39. The appellant has poked holes in the Prosecution's Case at the trial and there are two pertinent issues raised which are consistency of Prosecution's witnesses and regularity of the medical evidence admitted by the trial court.



40. I will begin with consistency of the evidence of the 3 Complainant's in particular. The State has contended that the evidence of the Complainants to wit PW1, PW4 & PW5 were consistent and corroborative but the appellant posed a pertinent question which I find plausible. He says that the evidence of PW1 indicates that he was caught in the act by PW2 and ran and asked that if that was true then when did he commit indecent acts on 2nd and 3rd complainants?
41. Looking at the testimony of FT (PW1) a girl aged 9 years, she testified that the appellant sat on a chair, a wooden chair and told her to sit on his thighs after telling her to undress. She stated that she sat on him facing him and as the appellant was attempting to insert his penis on her vagina, victim (PW2) appeared and according to PW1, the appellant then "ran off". She further stated that MK & JJ (PW5) were just standing there having also removed their underwear.
42. Now let me look at the testimony of V (PW2) a boy aged 11 years. According to him, when he went to Kavutha's hotel looking for the girls because it was late, he found the appellant on his knees having removed his trousers to the thighs and was defiling PW4 who had "lowered" her skirt" and when he saw that, he rushed to inform her mother. When he rushed back to the scene, the appellant had fled. There is a significant inconsistency there on the identity of the victim the appellant was caught either defiling or committing an indecent act with. But that is not all.
43. According to MK (PW4), the appellant first defiled FT then JJ and as he was in the process of defiling her (she insisted that the appellant inserted his penis into her vagina) V (PW2) appeared and found them out. So according to PW4, the appellant defiled all the 3 of them in turns and was caught as he was in process of defiling PW4.
44. However, when you look at the testimony of JJ (PW5), she stated that the appellant squatted and asked them to remove their clothes and sit on him adding that FT (PW1) was the first to sit on his thighs and that she (PW5) was then asked by the appellant to sit on him and when she sat on him, the appellant "did bad manners on her" and as he was doing so, V (PW2) appeared and they ran. So according to the testimony of PW5, the appellant did "bad manners" to her and FT There is no mention of MK (PW4).
45. From the above, it is clear from the evidence of PW1, PW2, PW4 and PW5, that the only consistent narrative is that of PW2 and PW4. Both of them agree that the appellant was caught when he was in the process of defiling or committing acts of indecency on PW4. The testimony of PW1 and PW5 however contradicts that because PW1 says that PW2 appeared at the scene as she was being defiled while PW5 insisted that PW2 arrived when she was being defiled. This court finds that the contradictions and the inconsistencies in respect to the sequence of events at the scene as narrated by the complainants casted a grey area on the Prosecution's Case.
46. Now turning to the medical evidence, it is also clear on the face of it that it contradicts the evidence of PW1, PW4 and PW5 in respect to the claims of defilement. PW1, PW4 and PW5 all insisted that the appellant inserted his penis into their vaginas a fact that is clearly contradicted by PW6 who stated that medical examinations on the 3 minors revealed no injuries on the private parts of the minors and vaginal swabs showed no spermatozoa.
47. This Court is alive to the provisions of Section 186 of the Criminal Procedure Code and while it is proper to make a different finding in a sexual offence other than the one upon which an accused had been charged, the evidence must be consistent and should support the finding or prove beyond doubt that the accused is guilty of another offence of a sexual nature. In this instance as I have indicated above, the testimonies of PW1, PW4 and PW5 were inconsistent and contradictory.
48. This court has also noted another anomaly in the evidence by the Clinical Officer Kioko Mutisya (PW6).



The witness just indicated that he was a Clinical Officer without giving his qualification to establish his competency to testify as an expert witness as stipulated under Section 48 of the Evidence Act. This court would have no hesitation in overlooking this anomaly but I find that the way he testified lacked sufficient clarity as to who actually examined the victims. He simply stated that PW4 was brought into the facility and “had no injuries on the genitalia”. He also stated that her hymen was intact but failed to clearly and positively state that he examined her himself and made the findings stated on the P3 Form. This Court has seen the P3 Forms tendered in Evidence and though the name of the Clinical Officer appears to be PW6 and is the one who filed it and signed them, he should have clearly stated so. In my view the witness, the trial court and the prosecution were a bit casual in the way they approached the medical evidence in respect to the 3 complainants. That is why the Medical Officer (PW6) even refers to one of the victim, as “RT”. A keen Prosecutor would have noted the mis-description and corrected it on the spot. The evidence of PW6 also shows that the Complainants were taken into the medical facility on two different occasions. He says PW4 was taken in first on a date he did not indicate while “RT” was taken on 3rd October, 2016. The P3 Forms of the 3 complainants were however signed on the same day on 3rd October, 2016.

There is also lack of clarity and consistency on the date the minors were escorted to hospital for medical examination.

49. According to PW1, PW3, PW4 and PW5 the 3 victims went for medical examination a day after the incident which was 26/9/2016. The Investigating Officer (PW8) however, stated that the 3 complainants reported the incident on 27/09/2017 and were escorted to hospital the same day after their reports were looked. The Clinical Officer (PW6) on the other hand states that PW1 was taken for examination on 3/10/2016. As noted above he does not give details on when the other 2 were examined but the P3 Forms were all signed on 3/10/2016.
50. While it is true that the above inconsistencies on when the complainants were examined may be insignificant and may not have been given weight by this court, the same when viewed in light of the other inconsistencies highlighted above (in particular the evidence of minors’ visa viz the evidence of PW6) casts a shadow of doubt on the Prosecution’s Case against the appellant. In such a scenario, this court finds that it was not safe for the trial court to render a conviction against the appellant. The trial court erred by not addressing its mind on those inconsistencies and had it done so probably the appellant could have been given the benefit of doubt which I hereby give.

In the premises this appeal is allowed. The convictions in respect to the 3 counts facing the appellant are hereby set aside and the sentences quashed. He is hereby set free forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF OCTOBER, 2023.

HON. JUSTICE R. LIMO-JUDGE

