



**Mutua v Republic (Criminal Appeal E069 of 2022)  
[2023] KEHC 23448 (KLR) (Crim) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23448 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E069 OF 2022  
K KIMONDO, J  
OCTOBER 12, 2023**

**BETWEEN**

**PETER MUTUA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the judgment in S. O. Case No. 45 of 2016 at the Chief Magistrates Court Kibera by M. Kamau, Senior Resident Magistrate, dated 24th February 2022)*

**JUDGMENT**

1. The appellant was adjudged guilty of defilement contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act* (hereafter the Act). He was sentenced to imprisonment for twenty years.
2. The particulars were that on 11<sup>th</sup> May 2016, at [particulars withheld], within Nairobi County, he intentionally and unlawfully caused his penis to penetrate the vagina of MNK [particulars withheld] a child aged thirteen years.
3. The appeal raises four grounds but which can be condensed into two: Firstly, that the conviction was based on inconclusive, contradictory and insufficient evidence. Secondly, that the learned trial magistrate disregarded the defence proffered by the appellant.
4. The appellant relied wholly on two sets of submissions forwarded to the High Court on 19<sup>th</sup> January 2023 and a rebuttal filed on 25<sup>th</sup> August 2023. The totality of those submissions is that the Republic failed to prove all the elements of the charge beyond reasonable doubt.
5. I should add that the appellant has attempted to raise a fresh ground of appeal in the submissions: That the succeeding magistrate failed to comply with section 200 of the *Criminal Procedure Code*. The Republic's reply is that the remedy lies in a re-trial. However, no leave was sought by the appellant or



was obtained as required by section 350 of the Criminal Procedure Code. Accordingly, this new ground is irregular and cannot be entertained at this stage.

6. The appeal is contested by the State. Learned State Counsel, Mr. Kiragu, relied wholly on the submissions dated 30<sup>th</sup> April 2023. In a synopsis, he argued that all the ingredients of the offence were proved beyond reasonable doubt. I was beseeched to dismiss the appeal.
7. This is a first appeal to the High Court. I have examined the record; re-evaluated the evidence and drawn independent conclusions. There is a caveat because I neither saw nor heard the witnesses. Njoroge v Republic [1987] KLR 19, Okeno v Republic [1972] EA 32, Felix Kanda v Republic, Eldoret, High Court Criminal Appeal 177 of 2011 [2013] eKLR.
8. I will begin with the age of the complainant. Her mother, PW2, testified that the complainant was born on 11<sup>th</sup> December 2004 as per the original birth certificate (exhibit 2). I am thus satisfied that at the time of the incident, the complainant was a child aged 13 years.
9. I will now turn to identification. The complainant's family and the appellant lived on the same plot which had two rows of houses. The appellant lived on the opposite side, a fact he freely conceded. The complainant said she knew him and that the neighbours referred to him as Peter Mutua.
10. On the material day, she was sent back from school to collect a pencil. The appellant pulled her into his house, threatened to stab her with a knife and defiled her. But according to the appellant, the child lingered outside his door to listen to loud music which made her mother suspicious. I will revert shortly to the defence. I am thus satisfied that the appellant was positively identified and placed at the locus in quo. This was in fact evidence of recognition. Wamunga v Republic [1989] KLR 424.
11. It is a truism that the legal and evidential burden rested squarely on the Republic. Woolmington v DPP [1935] AC 462, Bhatt v Republic [1957] EA 332. The question is whether the prosecution proved beyond a reasonable doubt that the appellant penetrated the complainant.
12. PW1, testified that after the appellant forced her into his house, he undressed her and put "his urinating organ" into her vagina and all the time threatened her with the knife. Her father, who was resting in their house, heard PW1's voice emanating from the appellant's house. He alerted PW1's mother (PW2).
13. When the appellant returned to the house after answering a call of nature, PW2 locked them inside and summoned the village elder. When the door was opened, both the complainant and the appellant were given a beating by the public and handed over to the police. There is some discrepancy because in cross-examination, PW1 claimed she was outside the appellant's house when he was locked inside.
14. The complainant was later examined at Nairobi Women's Hospital. PW2 testified that she "sensed that the [appellant] had defiled the girl as she was very confused and disoriented". Her fears were confirmed by the doctor who informed her that PW1 had been defiled. In cross examination, PW2 denied that she had sought monetary compensation from the appellant to have the case withdrawn.
15. Dr. Joseph Maundu (PW3) examined PW1 on 12<sup>th</sup> May 2016, four days after the incident. The hymen was broken with old tears. There were no bruises on the genitalia. He produced the P3 Form (Exhibit 3).
16. The clinical Officer was John Njuguna (PW4). He testified on behalf of his colleague, Christine Gakindi. The latter examined PW1 at Nairobi Women's Hospital on 11<sup>th</sup> May 2016, the date of the incident. According to the Post Rape Care Form (exhibit 2), her hymen was broken. A high vaginal swab revealed epithelial cells or pus cells.



17. I have also considered the defence by the appellant. In his unsworn statement, he protested his innocence and claimed he was a “scapegoat”. He said that he was in his house when he heard PW2 cajoling PW1 to go to school. Later at around 9:00 a.m., PW1 returned to pick up a pen. She then dawdled at his door raising suspicions of PW2. PW2 then locked him inside before summoning the village elder. He claimed there were demands for money and that when he failed to oblige, he was charged with defilement. He also alleged that there were further demands of Kshs 20,000 to have the case withdrawn.
18. One of the grounds in the appeal is that the defence was not considered. That is not true. The learned trial magistrate at pages 4 and 5 of the typed judgment analysed that defence. However, she concluded that PW1’s evidence was “graphic” and backed up by sufficient medical evidence.
19. My findings are as follows: The appellant and PW1 were caught inside his house. PW1’s father heard his daughter conversing with a man inside that house and alerted his wife (PW2). When the appellant returned from answering a call of nature he was locked inside until the village elder and youths came and took him to the police post. PW1 said she had sex twice with the appellant that morning. Medical evidence showed her hymen was broken with old scars. I readily find that the appellant had coitus with the minor. But I do not think the minor was forced into the act. I also find that the defence that the appellant was framed-up or being extorted is a red-herring.
20. I agree with the leaned counsel for the appellant that there were some inconsistencies in the evidence. For instance, as to whether both PW1 and the appellant were locked inside the house by PW2. It is equally true that the appellant was not subjected to a medical examination and that the examination on the complainant only revealed old scars and no spermatozoa. PW2 conceded that her daughter had a baby. It is not clear at what point she conceived. The complainant said she did not know the father of her baby.
21. Considering the scars were old, it may well be true that the complainant had been exposed to sex. But as I have stated, penetration by the appellant on the material day was proved by her unchallenged evidence and the fact that they were caught inside the appellant’s house. This was then corroborated further by the medical evidence.
22. I have thus reached the conclusion that the discrepancies in the evidence were immaterial. Furthermore, and as stated by the Court of Appeal, in any trial there are bound to be such discrepancies. [Joseph Maina Mwangi v Republic](#), Criminal Appeal No. 73 of 1993.
24. In the end, I find that the conviction was safe. I will now turn to the sentence. Section 354 (3) of [Criminal Procedure Code](#) empowers this court to review the sentence. Under the proviso to section 20 (1) of the [Sexual Offences Act](#), the appellant was liable to imprisonment for life. When a penal provision is prefaced by the words “liable to” the sentence following is not a minimum sentence. Furthermore, the Court of Appeal has given fresh guidance on minimum sentences under the [Act](#) in [Jared Koita Injiri v Republic](#) [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the [Sexual Offences Act](#), and if the reasoning in the Supreme Court [in [Muruatetu’s](#)] case was applied to this provision, it too should be considered unconstitutional on the same basis.
25. I have considered the appellant’s mitigation. He is a first offender and was remorseful. I will accordingly set aside the sentence of twenty years. I substitute it with a sentence of 7 (seven) years in jail. The sentence shall run from 22<sup>nd</sup> February 2022, the date of his original sentence. Furthermore, and in



accordance with section 333 (2) of the *Criminal Procedure Code*, the period spent in remand custody from the date of his arrest on 11<sup>th</sup> May 2016 to 18<sup>th</sup> August 2016 when he was released on bail shall be deducted from the sentence.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**KANYI KIMONDO**

**JUDGE**

Judgement read in open court in the presence of:

The appellant

Mr. Otieno for the Republic instructed by the Office of the Director of Public Prosecutions

Mr. E. Ombuna - Court Assistant

