Mutheu v Republic (Criminal Appeal 75 of 2013)
[2025] KEHC 13323 (KLR) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13323 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 75 OF 2013

RC RUTTO, J

SEPTEMBER 25, 2025

BETWEEN

ERICK MUMO MUTHEU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising out of the conviction and sentence of Hon T.A Odera (PM) delivered on 18th February 2013 in Mavoko Principal Magistrate's Court criminal case no 288 of 2012)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 14th October 2010 in Athi River District within Eastern Province, he intentionally caused his penis to penetrate the vagina of one IW a child aged 9 years. 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 were that on 14th October 2010 in Athi River District within Eastern Province, he touched the vagina of one IW a child aged 9 years.

2. The Appellant pleaded not guilty and the trial commenced with the prosecution calling seven witnesses and the Appellant calling one witness, when he was put on his defence.

3. Upon evaluation of the evidence before it, the trial court delivered its judgment on 18th February 2013 wherein it found the Appellant guilty of the main charge and convicted him. It sentenced him to life imprisonment.

4. Being dissatisfied by the conviction and sentence, the Appellant preferred this appeal on the grounds thatthe learned Trial Magistrate erred in law and fact;

    a. When he failed to find that the testimonies advanced were inconsistent and contradictory statement.

b. When he failed to find that the trial was unfairly conducted.

c. When he convicted on an irregularly drafted charge sheet.

d. When he denied the Appellant a right to mitigate breaching section 77 of *the Constitution* (defunct) .

e. When he relied on inconclusive scientific report to convict. No DNA test was done.

f. When he convicted on unproved allegations as vital witnesses did not testify.

g. When he rejected his plausible defence on weak reasons.

5. As a preliminary issue, it is worth noting that when this appeal was first set down for hearing by way of written submissions, it could not proceed as the Court noted that the Appellant was not coherent in his submissions and the prosecution counsel informed the Court that the Appellant has been having psychological problems while in prison and was seeing a psychiatrist. Consequently, on 21st March 2014, the Court determined that the Appellant was unable to make his defence. Guided by section 162 of the Criminal Procedure Code the Court thus postponed the hearing of the appeal to facilitate the Appellant's treatment. In particular, the Court rendered itself as follows;

> "I therefore commit the Appellant to the safe custody of Mathari National Teaching and Referral Hospital in Nairobi for treatment until he can understand these proceedings. In the event that the Appellant is found by the medical officer in charge of Mathari National Teaching and Referral Hospital to be capable of prosecuting his appeal while so detained in safe custody, the medical officer shall forthwith forward a certificate to that effect to the Director of Public Prosecutions, who shall thereupon follow the procedure set out in sections 163 and 164 of the Criminal Procedure Code."

6. The Officer in charge, Mathari National Teaching and Referral Hospital was directed to file a Medical Psychiatric Report to advice on the mental state of the Appellant. On 23rd April 2024, the Court directed that the Appellant be taken for fresh psychiatric/mental assessment and the same be facilitated by the In-charge Kamiti Maximum Prison.

7. From the Court's record, a mental assessment was done and a report dated 14th May 2024 indicated that the Appellant has been on treatment and was stable and fit to follow proceedings. The Court further directed that a pro-bono advocate be appointed to assist the Appellant prosecute its case. The Appeal was thus canvassed by way of written submissions.

8. Counsel for the Appellant informed Court that the Appellant had filed submissions dated 13th July 2017. In the submissions, the Appellant set out new amended grounds of appeal as follows, that:

    1. The circumstance of his arrest were unsatisfactory and not commensurate with the date of the offence.

    2. The evidence of the government analyst was obtained in total violation of Article 50(4) of *the Constitution*.

    3. The burden of proof was not discharged; and

    4. The conviction was unsafe and not based on sound evidence

9. The Appellant submitted that there were two conflicting versions of when the offence was committed. He made reference to the evidence of PW3 who stated that the offence took place on 16th October 2010

while PW7 made reference to the 14th October 2010. He faulted the trial court for failing to take note of the contradiction and inconsistency of the prosecution case.

10. The Appellant also took issue with the fact that the government analyst received the samples on 13th October 2010 yet the offence is said to have taken place on 14th October 2010. He therefore urged that the case was fabricated against him and it was a violation of his rights. The Court was urged to quash the conviction and set aside the sentence. In support of his case, reliance was placed on the cases of Dinkarrhai Pandya vs Republic (1957) EA 336, Vincent Gathu Mbogua vs Republic, Criminal appeal no 64 of 2004.

11. The Respondent filed its submissions dated 17th July 2017. It submitted that the charges against the Appellant were proved beyond reasonable doubt and that the conviction should be upheld and sentence confirmed. In support of its argument, the Respondent relied on the case of Daniel Mutiso Ngui vs Republic (2015) eKLR.

12. The Respondent submitted that the date on the typed proceedings indicated as 16th October 2010 was a typographical error as the original record shows that the magistrate wrote a figure similar to letter 4 and 6, which is not clear. The Court was urged to rely on the proceedings of when the matter began de novo. As to the dates on the Exhibit Memo, the Respondent submitted that a perusal of the original file show that the exhibits were submitted on 15th October 2010 and the report was signed on 22nd September 2011 thus, the date on the exhibits was a typing error as it is not possible for exhibits to be taken a day before the offence.

13. The Respondent made reference to section 124 of the *Evidence Act* to submit that in sexual offences it is not necessary for evidence of victim or complainant to be corroborated before an accused can be convicted.

Determination

14. I have considered the Trial Court record, the memorandum of appeal and the submissions on record and find that the issues for determination are;

    a. Whether it was proven beyond reasonable doubt that the Appellant committed the offence; and

    b. Whether the sentence should be reduced.

15. This Court is guided on its duty as an appellate court by the finding of the Court of Appeal in the case David Njuguna Wairimu v Republic [2010] eKLR where the Court stated thus: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court.

16. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The ingredients that ought to be established in an offence of defilement are: the age of the complainant, proof of penetration and the positive identification of the assailant.

17. Looking into the three grounds, the first one is the age of the complainant.The Court of Appeal in Malindi in Mwalengo Chichoro Mwajembe v Republic, Msa. App. No. 24 of 2015 (UR) held as follows: -

> " .....the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense."

18. In this case, the victim testified on 1st October 2012. During voire dire examination she stated that she was 10 years old. PW2 stated that the PW1 was born in April 2002 indicating that she was 8 years as at the time of the alleged offence. This was further corroborated by the evidence of PW6 who produced the P3 form which indicated that the minor was 9 years. As the offence happened in 2010, then it is right to conclude that at the time the victim was 8 years while she was 10 years when she testified in 2012. Bottomline, the victim was below the age of 12 years as provided under section 8(2) of the Act. Notably, the age of the victim was not challenged in this appeal. I thus find that the age of the Victim was sufficiently proven.

19. The second ingredient is positive identification of the assailant. From the evidence it is not in dispute that the incident occurred in broad daylight. Further, PW1, she stated that " Erick is the one who did for her tabia mbaya." She also stated that she did not know him before but trusted him when he said he knew Mbithi and Kemuogha. PW1 was consistent in her examination in chief as well as during cross examination about her knowledge of the Appellant. He was also found red handed by PW3 while in the act. PW3 stated that a young boy holding hands of two young girls stopped him and told him that a boy was doing tabia mbaya to a girl who was in their company. He carried them on his motor cycle and they took him to the scene. He stopped his motor cycle and saw a boy lying on top of a girl. When he reached, the Appellant started running while holding his trousers which he wore half way. That he was able to get hold of the Appellant and with the assistance of another man took the Appellant to the police station

20. Be that as it may, the Appellant did not deny knowledge of the victim. Taking the totality of the evidence, this Court is satisfied that the issue of identification was proven.

21. The third element is penetration. From the record, the victim stated as follows;

> " He asked me to lie down and I laid as he strangulated me. He then ordered me to remove my clothes and he threatened to kill me if I refused. He then raped me. He raped me using his thing for urinating which he inserted into my thing for urinating. I screamed but he held my throat.....
>
> He used a piece of wood to threaten me. He also removed a knife and threatened to stab me with it. He removed it from his trousers"

22. Upon cross examination, PW1 testified that "I was lying down and you had held my throat and laid on my leg so I could not scream or ran away. You removed a knife upon laying on me." This testimony leaves the Court with no doubt that the victim was testifying an act of sexual penetration and/or defilement.

23. This evidence was also corroborated by PW3 who found the Appellant lying on top of the victim, in the act. In addition, the P3 form and treatment notes produced by PW6, the medical officer, indicated that the hymen of PW1 was torn and she was bleeding from the vagina. According to him, this was evidence of defilement. The totality of this evidence leaves no doubt that indeed the victim was defiled.

24. I have noted the contradiction raised by the Appellant that in the evidence of PW4, the Principal Government Analyst, he testified that the samples with regard to this case were received on 13th October 2010, a day before the alleged incident on 14th October 2010. The Prosecution has urged the Court to consider the exhibit memo on record since the date 14th October 2010 was a typographical error. I have considered the same, although faint, perhaps due to the passage of time and the same is dated 15th October 2010. The Court was unable to decipher the contents therein. However, from the evidence of the PW7, Pauline Katuni who was the investigating officer, she took the panty of the complainant and that of the accused to the government chemist on 14th October, 2010. Be that as it may, it is trite that defilement is proved by way of oral evidence and that medical evidence is only but corroborative. The alleged minor errors in the date the exhibit memo was received at the government chemist does not negate the direct evidence of PW3 who caught the Appellant in the act.

25. I have also considered the allegation of the Appellant that the evidence of PW3 and PW7 were contradictory in that it is not clear whether the offence took place on 14th or 16th of October 2010. The court was able to call for the original record and upon perusal of the same on page 82, PW3 told the Court that the offence took place on 14th October 2010. That is therefore not in issue.

26. The standard of proof in criminal cases is beyond reasonable doubt. The question before the Court is thus whether the above contradictions go into the substance of the case and were fatal to the prosecution's case. The Court of Appeal in the case of Joseph Maina Mwangi v Republic [2000] eKLR) while dealing with a similar question held as follows:

> " The witnesses were not ad idem on who recovered the expended cartridges from the scene of the first set of robberies and, likewise, on the number of bullets which were in the magazine which was allegedly recovered from the appellant. In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence."

27. The Upshot is that I am satisfied that all the essential elements of the offence of defilement were established beyond reasonable doubt.

28. Turning to sentence, the Appellant herein was sentenced to life imprisonment. The offence committed was contrary to section 8(2) of the *Sexual Offences Act* which provides that;

> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life

29. The issue of sentences under the *Sexual Offences Act* was settled by the Supreme Court in the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR). These minimum mandatory sentences were found to be constitutional hence legitimate.

30. The Appellant has not given this Court any legitimate and legal reason to interfere with the sentence meted out by the Trial Court, the same having been within the law. Consequently, the same is upheld.

31. The upshot is that, this appeal lacks merit and the same is dismissed in its entirety.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 25TH DAY OF SEPTEMBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....Appellant

.....Respondent

Selina Court Assistant