Muthuri v Republic (Criminal Appeal 106 of 2019)
[2025] KECA 1521 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1521 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 106 OF 2019

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 3, 2025

BETWEEN

MORRIS MUTHURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Mabeya J.) delivered on 20th June 2019) in H.C.CR. A. No. 139 of 2018)

JUDGMENT

Background

1. Morris Muthuri, (the appellant), was charged before the Senior Resident's Magistrate's Court at Nkubu with the offence of defilement contrary to Section 8(1) as read with Section 8 (4) of the *Sexual Offences Act* Cap 63A. The particulars of the offence were that on diverse dates between 28th March 2017 and 9th April 2017 in (Particulars wiheld) Township in Imenti South Sub County within Meru County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MM a child aged 16 years.

2. The alternative count which the appellant was charged with was committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* Cap 63A. The particulars being that on the same dates alluded to, the appellant intentionally and unlawfully touched the buttocks, breasts and anus of MM a child aged 16 years with his penis.

3. The appellant pleaded not guilty to the charges being preferred against him. After considering the evidence before it, the trial court found the appellant guilty of the main count of defilement and convicted him to serve 15 years imprisonment.

4. The prosecution called six (6) witnesses in support of its case. MM (PW1) testified that on 28th March 2017, she met her cousin, one BK(PW3) and they went to Drips Club (the Club) which was owned by the appellant. When PW1 got there, PW3 informed her that the appellant had seen her photo via 'WhatsApp' and that he had asked PW3 to take her (PW1) to him. It was her further evidence that at about 4.00p.m. the appellant together with his friends, PW1 and PW3 started drinking alcohol at Drips Club.

5. It was PW1's further testimony that at around 8.00p.m. on the same night, PW1 told PW3 that she would like to leave to go home. PW1's phone was charging elsewhere and she went to pick it. She found several missed calls from her father. It was her further evidence that the appellant grabbed PW1's phone and threw it to the ground. That the phone's screen broke and PW1 had no means of communicating to her family.

6. PW1 testified that she could not leave the club without her phone since her parents purchased it for her. It was her further evidence that the appellant informed PW1 that he would replace the phone but she would have to wait until the club closed to enable them purchase another phone. It was PW1's further testimony that at 11.00 p.m, the club closed and the appellant, PW1, PW3 and a barmaid went to a nearby shop to purchase a phone. The appellant however declined to purchase the phone and stated that he would do so the following day.

7. It was PW1's further evidence that the appellant suggested that they drop the barmaid on the way home which they proceeded to do so. That she, the appellant and PW3 took a detour and proceeded to another club and continued drinking. That at this point it was already 2.00 a.m. and the appellant took them to a lodging called Black Africa to spend the night. It was PW1's evidence that they booked a single room where the three of them slept. It was PW1's further evidence that the following morning at about 7.00a.m. when she woke up, she found that PW3 had left the room. That she also found that she was naked and the appellant only had his underwear and vest. It was PW1's evidence that she took a bath and that she and the appellant left and went back to the Club. It was her further testimony that she then called PW3 to take her home. That while on the way, PW1 and PW3 agreed that the version of events that PW1 would tell her parents is that she was kidnapped and taken to Isiolo.

8. It was PW1's testimony that she went home with her cousin (PW3) and her parents inquired of her whereabouts, she stated that she had been kidnapped. That she stayed in bed the whole day and thereafter, her parents took her to Nkubu Police Station where they made a report. They then took her to Nkubu Consolata Hospital where HIV and HVS tests were done on her.

9. PW1 further testified that on 9th April 2017, she left home and proceeded to church. That at about 2.00p.m. she went to the Club to check on her phone. That she, together with the appellant and his friends started drinking again and PW1 did not go back home that night. It was her evidence that she, one Pam and the appellant slept in a room behind the Club which had one bed. It was her further evidence that the following day, she stayed at the Club while the appellant went to check on her phone. It was her testimony that shortly thereafter, her parents, her elder brother and a police officer went to the Club and arrested her. It was PW1's evidence that she was taken to Kanyakine Hospital where she was tested and put on medication. PW1 testified that it was not the first time that she had sexual intercourse.

10. Seberina Kaimatheri (PW2) a clinical officer attached at Kanyakine Sub District Hospital, produced the P3 Form in respect of PW1. On examination of the genitalia, she classified the injuries as grievous harm due to the psychological trauma to PW1. The hymen was absent suggesting that there was penetrative sexual intercourse.

11. PW3 confirmed the events which took place on 28th March 2017. She further confirmed that after their drinking spree, the appellant took the three of them to Black Africa lodging where the three of them slept. It was PW3's evidence that the following day she woke up at 6.00a.m. and left the room since she was taking her child to the hospital. That she left PW1 and the appellant in the same room. That she then went back to pick PW1 at Drips Club at 2.00 p.m. and took her home. PW3 testified that PW1 did not inform her what had transpired on the material night.

12. Benking Kieni (PW4) is PW1's brother. He testified that on 10th April 2017, he went to check on her sister's phone at the repair shop operated by one Freddie. He testified that previously, his sister had informed the family that she had been kidnapped and her phone was stolen but later she informed him that the screen broke and the phone was at the repair shop. It was his evidence that when he arrived at the repair shop, the owner of the shop, Freddie, informed him that he was at Drips Club with PW1. That Freddie declined to issue instructions to his employee to release the phone and stated that the person who brought the phone to his shop is the person who should pick it and that that person was the appellant. PW4 called his father, Henry Kimathi (PW5) and cousin and PW5 made a report at Nkubu Police Station. It was PW4's evidence that when they reached Drips Club, they took PW1 to the police station where she recorded a statement.

13. Henry Kimathi Kieni (PW5) is PW1's father. It was his testimony that after his daughter failed to return home on 9th April 2017, PW5 decided to go and make a report at the police station the following day. Before going to the police station, he passed by a friend's shop opposite Drips Club to ask whether he had seen his daughter. It was his evidence that he was informed that PW1 was at Drips Club. That he proceeded there with 5 police officers including the OCS. It was his further testimony that as they were heading to Drips Club, the appellant escaped in a getaway car and that he found his daughter (PW1) surrounded by bottles of beer. It was his evidence that he took PW1 for medical examination at Kanyakine and they recorded their statements on 11th April 2017 at Nkubu Police Station.

14. No. 92674 PC Cylene Mueni (PW6) based at the Nkubu Police Station narrated the history of the matter as it was reported to her. She testified that PW1 informed her that on 9th April 2017 she was with the appellant at Drips Club and spent the night in a room upstairs. That the appellant was with another lady and the three of them slept in the same room. That the appellant had sex with the other lady since PW1 was on her menstrual cycle. Further, that the appellant touched PW1's breasts.

15. The appellant denied committing the offence and was placed on his defence. In his sworn defence, he testified that on 27th March 2017, he received a call from a client who informed him that he wanted to be taken to purchase a motorcycle engine at Meru Town. That on 28th March 2017 he took a vehicle and proceeded to Meru town with the client and a mechanic. That after purchasing the engine, they went back to Tharaka at around midday to fix the engine. It was his evidence that he went back to Drips Club at around 9.00 a.m., took three beers and waited for the Club to close at 11.00 p.m. so that he could go home with his wife. He testified that on 9th April 2017 he went to the Club for stock taking and thereafter he went to carry people from Nkubu to Meru as was his normal routine. He testified that he worked until 10.00p.m on the material night.

16. The trial court considered the prosecution's case and the appellant's alibi defence which was found to be an afterthought. The trial court found that the appellant at the time of the incidence was a minor aged 16 years and 9 months who had no capacity to give consent for two reasons: first, she was intoxicated and second, she had not attained the age of majority.

17. The trial court found as follows:

> " The evidence before court shows that the circumstances of this case were premeditated and well planned by the accused and the complainant's cousin to lure the complainant to go to the accused person's club, buying her alcoholic drinks until late in the night and subsequently hiring a lodging for the three of them only for the complainant to be left in the room with the accused person where she found herself naked when she woke up. It is clear that the accused person's conduct shows that he had the intention of having sexual intercourse with of (sic) the complainant which intention he managed to make good with the assistance of the complainant's cousin. The evidence before me places the accused person at the scene of the offence being Black Africa lodging and also at Drips Club where the complainant spent the night on the 9/4/2017. I therefore find his alibi defence being but an afterthought and unbelievable and I reject it as such..."

18. The trial court held that the prosecution had established the ingredients of the offence of defilement against the appellant as required under the law and sentenced him to 15 years' imprisonment.

19. Dissatisfied by that decision, the appellant appealed to the High Court raising grounds inter alia that the trial court erred in law and fact by failing to note that the prosecution case was not proved beyond reasonable ground. The High Court (Mabeya, J.) upheld the conviction and sentence imposed by the trial court and held in part as follows:

> " ...taking all the circumstances of the case into consideration, I am satisfied that there was an intention to defile the complainant which the appellant successfully carried out. This is deducible from the following:
>
> a. Luring the minor to his bar and entertaining her with alcoholic drinks for close to 10 hours. This was meant to confuse the minor and make her defenceless at the opportune time when he needed to pounce on her;
>
> b. Breaking the minor's phone to cut off any communication with her parents;
>
> c. Securing a room for overnight sleeping with the minor at a dingy lodging at Kariene;
>
> d. The minor waking up tired and experiencing pain both on her private parts and her back; the pain in her private parts was suggestive of forcible entry..."

20. The High Court held as follows:

> "The appellant used his bar to lure the minor into antisocial behaviour. He took advantage of the minor. He is unfit to be left to wander (sic) freely in a civilized world which shou be curtailed. He is lucky that the trial court only meted out to him the minimum sentence of 15 years. From his conduct, a higher sentence would have been a just course. In the premises, I find the appeal to be without merit and I dismiss the same."

21. Undeterred, the appellant has now filed this second appeal premised on the amended grounds of appeal contending that the learned Judge:

> i. erred in matters of law by failing to note that the complainant gave contradictory and paradoxical evidence in court;

ii. erred in matters of law by failing to note that the penetration is not supported by medical evidence;

iii. erred in matters of law by falling to consider that the legal provision for mandatory sentences under the *Sexual Offences Act* Cap 63A denies the judicial officers the discretion to impose appropriate sentence which is unconstitutional and unfair in breach of Article 27 (1) (2) and (4) of *the Constitution*. Hence, the sentence imposed on the appellant is unlawful.

Submissions

22. The appeal before us was heard by way of written submissions. The appellant appeared in person while the learned Prosecution Counsel, Ms. Nandwa appeared for the respondent.

23. In his undated submissions, the appellant submitted that PW1 gave contradictory evidence by testifying that on the night they spent time together, her pants and clothes had been removed and at the same time when she woke up, she had her clothes on. He further submitted that the evidence of PW4 was that PW1 was at the bar alone while the evidence of PW5 was that he found a barmaid and a small child at the bar.

24. The appellant submitted that these contradictions were grave and affected the material evidence and charge which are the real substance of the case. The appellant relied on the decisions of the Court of Appeal of Nigeria David Ojeabou vs Federal Republic of Nigeria and Court of Appeal of Tanzania Dickson Elia Nsamba Shapwata & Another vs The Republic CR. Appeal No. 92 of 2007 where both courts discussed what constitutes contradictory evidence and their effect.

25. On the issue of penetration, the appellant submitted that the alleged offence took place on the morning of 29th March 2017. That the P3 Form produced was filed on 10th April 2017 approximately 12 days after the ordeal. That the age of the injuries was said to have been 3 days old. The appellant submitted that the charge does not support the evidence on record as it is not clear when precisely the offence occurred.

26. The appellant further submitted that PW1 informed the court that on 9th April 2017 the appellant did not defile her. That the report having been made on 10th April 2017 implies that the incident happened on 7th April 2017. It was submitted that the evidence adduced by the clinical officer (PW2) showed that she was not able to determine whether PW1 was defiled the first or the second time. Further, that on the second occasion, PW1 informed her father that she was not defiled.

27. In support of this submission, the appellant referred to the decision of this Court in John Mutua Munyoki vs Republic (2017) KECA 376 (KLR) for the proposition that lack of hymen could not be attributed to the alleged incident involving the appellant therein. The appellant further referred to the decision of this Court in P.K.W vs Republic (2012) KECA 103 (KLR) to support his submission that the hymen cannot only be ruptured by sexual intercourse. The appellant contended that the offence of defilement should not be limited to only age and penetration as the only conclusive proof since young girls would engage in sex freely then opt to report to the police whenever they disagree with their boyfriends.

28. The appellant submitted that the sentence was harsh and urged us to consider the decision of this Court in Julius Kitsao Manyeso vs Republic (2023) KECA 827 (KLR) whereby life sentence was declared unconstitutional. It was submitted that the sentence did not give the trial court the discretion to mete an appropriate sentence. In conclusion, the appellant submitted that there was no direct, cogent,

convincing and compelling evidence to warrant the second appellate court to dismiss the appeal. He urged that the appeal be allowed, the conviction quashed and the sentence set aside.

29. Ms Nandwa opposed the appeal and submitted that the age of PW1 was proved to be 16 years old at the time of the offence. That penetration was proved since upon examination, the hymen was found to be broken and the degree of the injury was noted to be grievous harm. Counsel further submitted that the appellant's actions were premeditated by buying PW1 alcohol, making her drank and she may not have been aware of her faculties when the appellant without consent defiled her. Counsel referred us to Section 124 of the *Evidence Act* which guides the court to solely rely on the evidence of a victim, devoid of other evidence placed before it, if the court believes the evidence to be truthful.

30. On the identity of the perpetrator, counsel submitted that on the night of 18th March 2017, PW3 introduced PW1 to the appellant and therefore, they became acquainted with each other. Counsel asserted that there was therefore no mistaken identity of the appellant as the perpetrator.

31. On sentence, counsel submitted that the sentence of 15 years imprisonment was in compliance with the law and was lenient taking into consideration the circumstances of the case. Counsel urged us to dismiss the appeal and uphold the conviction and sentence. Determination

32. This is a second appeal. Our jurisdiction is only limited to matters of law as stipulated under Section 361 of the Criminal Procedure Code Cap 75. In interpreting the said provision, in Hamisi Mbela Davis & Another vs Republic (2012) KECA 147 (KLR) this Court held as follows:-

> " This being a second appeal, this Court is mandated under Section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu v Republic (1983) KLR 445:-
>
> "Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holding of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin vs Glyneed Distributors Ltd (t/a MBS Fastenings)."

33. In other words, the essence of a second appellate court, will except in exceptional circumstances, concern itself only with the application of the law fully being satisfied that matters of facts were settled by the two courts below. Further emphasis was put by this court in Erick Onyango Ondeng' vs Republic (2014) KECA 523 (KLR) that: -

> " ...this Court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct advantage of not having seen or heard the witnesses. This Court will therefore not interfere with findings of fact by the two courts below unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, the courts below were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

34. In the instant appeal, the only matters of law for us to consider are

    (i) whether the prosecution proved its case beyond reasonable doubt;

(ii) whether the alleged inconsistencies in the testimonies of the witnesses was fatal to the prosecutions' case; and (iii) the severity of the sentence meted out by the trial court.

35. The other issues being raised by the appellant are matters of fact which we have no jurisdiction to entertain as we would be usurping the powers of the court of the first instance and the first appellate court. Nonetheless, we shall weigh in on the aspect of whether defilement was proved considering the evidence of penetration. There is no question as to the age of PW1 at the time of the incident was 16 years old and therefore a minor. PW1 testified that she was 16 years old which testimony was corroborated by her father, PW5. Further, PW6, the Investigating Officer produced PW1's birth certificate which indicated that PW1 was 16 years old.

36. The identity of the perpetrator was also not in question. The appellant raised the defence of alibi. PW1 and PW3 both placed the appellant at the scene. The appellant claimed to have been with his wife on the material day. It is notable that the appellant had no duty to prove his defence which duty wholly lies on the prosecution.

37. This Court in the case of Kasaam Ukiru vs R [2014] eKLR stated as follows:

> "We are fully alive to the principle that an accused person who sets up an alibi does not assume any burden to prove the same. In this case however the two courts below rejected the appellant's alibi defence on the basis first that it had not been raised at the earliest opportunity in the proceedings and second weighing the defence with all other evidence adduced the appellant's guilt was established beyond all reasonable doubt. The appellant's complaint that his defence was not considered is therefore without merit and we reject it."

38. The medical report confirmed that PW1's hymen was missing. It is on record that PW1 admitted that she had sexual relations before. It is on record that on the material night when PW1 woke up in the company of the appellant she found herself naked and did not know what had transpired during the night. It was her evidence that she felt tired and had pain on her back and private parts. She was taken to Nkubu Consolata Hospital where she was examined by PW2, the Clinical Officer who testified that PW1's hymen was broken and that she formed the opinion that PW1 had been defiled. It was PW2's further evidence that the degree of injury was grievous harm.

39. Section 124 of the *Evidence Act* Cap 80 allows the trial court to accept the evidence of a victim if they are being truthful. The fact of a sexual offence need not be proved at all times by medical examination. The oral evidence and the circumstantial evidence are enough. See - Kassim Ali vs Republic [2006] KECA 156 (KLR).

40. This Court in Arthur Mshila Manga vs Republic [2016] KECA 691 (KLR) weighed in on the issue of the impact of the age of the injuries and held as follows: -

> "From both the evidence of PW3 as well as the P3 form, which we have carefully perused, other than noting absence of hymen and consequently an open vagina, Jenliza never expressed any opinion that the JM had been defiled, or defiled the previous day. There was nothing on record to suggest that JM had lost her hymen the day before Jenliza examined. The medical evidence having failed to confirm that JM was defiled, the only other evidence of defilement was that of JM. It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed vs Republic (2008) KLR G&F, 1175 and Jacob Odhiambo Omuombo vs Republic (supra)..." [Emphasis supplied].

41. On the alleged contradictions, the specific contradictions as to PW1's testimony which the appellant highlighted was the evidence that she woke up naked but she later testified that she still had her clothes on.

42. Our finding is that such consistencies are bound to occur in evidence.

Human recollection is not infallible. The critical question which should be answered is whether the discrepancies are minor and therefore inconsequential or whether they are major, substantial and fundamental to create some doubt and therefore vitiate the prosecution's case. In John Nyaga Njuki & 4 others vs Republic (2002) KECA 288 (KLR) this Court expressed itself as follows on the issue: -

> "In certain criminal cases, particularly those which involve many witnesses, discrepancies are in many instances inevitable. But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused. The discrepancies in the evidence in the matter before us are in our view, of a minor nature considering the facts and circumstances of the case."

43. In the circumstances, we find no reason to interfere with the concurrent findings of the two courts below. We therefore find that the appellant's conviction was safe.

44. On the issue of sentence. The law under Section 8(4) of *Sexual Offences Act* provides that a person who commits the offence of defilement of a child between the age of 16 and 18 years is liable to imprisonment for a term of not less than 15 years. Sentencing is a matter of the trial court's discretion. The appellant has not demonstrated that the trial court did not take into consideration any relevant factor or considered extraneous factors before meting out its sentence.

45. This Court in the decision of Octavious Waweru Kibugi V Republic Criminal Appeal No. 41 of 2018 stated as follows:

> "On the issue of sentence, we defer to the recent decision of the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA} & 3 others {Amicus Curiae) (Petition E018 of 2023} [2024] KESC 34 (KLR) where the Court held that the minimum mandatory sentences under the *Sexual Offences Act* remain lawful until determined otherwise by the Supreme Court when the matter is properly escalated to that Court. That being the case, this being a second appeal, severity of sentence becomes a question of fact which is, by dint of section 361 (2) of the Criminal Procedure Code, outside our remit."

46. By parity of reasoning, we find that this appeal is devoid of merit and we dismiss it in its entirety.

47. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....**..**

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR