Mule v Republic (Criminal Appeal E069 of 2024)
[2025] KEHC 14675 (KLR) (21 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E069 OF 2024

KW KIARIE, J

OCTOBER 21, 2025

BETWEEN

JOSEPH MULE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E001 of 2021 of the Senior Principal Magistrate's Court at Tawa by Hon. L.K. Mwendwa–Principal Magistrate)

JUDGMENT

1. Joseph Mule, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that on the 18th day of June 2020, at [Particulars withheld] Market, Mbooni West subcounty, within Makueni County, he intentionally caused his penis to penetrate the vagina of RS, a child aged sixteen years.
3. The appellant was sentenced to serve twenty (20) years' imprisonment. He was aggrieved and filed this appeal. He raised the following grounds of appeal:
   a) The learned trial magistrate erred in matters of law and fact by failing to observe that the evidence procured by the prosecution did not have any probative value.
   b) The learned trial magistrate erred in matters of law and fact by failing to find that material contradictions and inconsistencies marred the whole case.
   c) The learned trial magistrate erred in matters of law and fact by failing to properly consider the cogent defence which reasonably exonerated the appellant from the commission of the offence.

d) The trial court imposed a sentence of twenty (20) years' imprisonment, which is manifestly harsh, excessive and a mandatory minimum sentence against the recent jurisprudence.

4. The state opposed the appeal through Mr. V. Kazungu, learned counsel. He contended that the prosecution proved the case to the required standards and that the sentence that was imposed was appropriate.

5. The appellant was sentenced to twenty (20) years' imprisonment. He was aggrieved and filed this appeal against both the conviction and sentence.

1. This is a first appellate court. As expected, I have analyzed and reevaluated all the evidence presented before the lower court, and I have drawn my own conclusions, bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of Okeno vs. Republic [1972] EA 32.

2. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:

a) That there was penetration of the complainant's genitalia;

b) That the accused was the perpetrator; and

c) The age of the complainant was below eighteen years.

These ingredients were restated in Fappyton Mutuku Ngui vs. Republic [2012] eKLR as follows:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant.

These are the ingredients that the prosecution must prove against an accused person.

8. The copy of the Certificate of Birth provided to verify the complainant's age indicates that she was born on 29 December 2004. As of 18 June 2020, she was 15 years and six months old. This evidence supports her age.

9. RSM (PW4) was the complainant. Her evidence was that at about noon, she went to fetch water. The appellant called and then grabbed her and told her that he wanted to mess with her life. He was armed with a machete. He ordered her not to scream or else he was going to cut her with the machete. He removed her innerwear and defiled her. The appellant promised to buy her a phone with which she could call him.

10. The appellant denied any involvement with the offence.

11. Nicholas Mutinda Matheka (PW1) stated that the complainant told him the appellant claimed she was his wife before she was defiled. When he later confronted the appellant, he admitted to the offence. Two issues arise from this witness's evidence: one is the alleged confession, and the other is the discrepancy between the complaint's evidence and that of PW1.

12. Section 25A (1) of the Law of *Evidence Act* provides:

> A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.

13. The alleged confession by the appellant cannot form a basis for a conviction. It may be prejudicial.

14. There was no attempt by the prosecution to reconcile the variance between the evidence of the complainant and that of PW1 as to what transpired before the defilement. This variance raised doubts about who was telling the truth between the complainant and PW1. The Court of Appeal in the case of Ndungu Kimanyi vs Republic [1979] KLR 283 (Madan, Miller, and Potter JJA) held:

    The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

15. Although a DNA analysis report is not always necessary, in this case, where the evidence regarding the perpetrator's identity is barely sufficient, it was essential to obtain it. I agree with the holding by the Court of Appeal in Mbogo v Republic (Criminal Appeal 106 of 2017) [2025] KECA 374 (KLR)> The Court stated:

    21. In our view, nothing would have been easier than for the prosecution to establish beyond a reasonable doubt who the father of the child was and therefore arraign the perpetrator with proof of DNA. As we say this, we are aware that DNA is not a mandatory requirement to prove the ingredients of the offence under the *Sexual Offences Act*, and we are not in any way saying that it must be done, but this was a case that had so many gaps, and it is not a safe conviction.

16. The appellant requested a DNA test at the earliest opportunity, but the prosecutor stated he would not rely on DNA. The DNA test results could have either implicated or exonerated the appellant. This was a critical omission. The prosecution did not prove that the appellant was the perpetrator.

17. From the foregoing analysis of the evidence on record, I find that the prosecution did not prove its case against the appellant to the required standards. I accordingly allow the appeal. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT MAKUENI, THIS 21ST DAY OF OCTOBER 2025

KIARIE WAWERU KIARIE

JUDGE