Muia v Republic (Criminal Appeal E010 of 2024)
[2025] KEHC 14722 (KLR) (21 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14722 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E010 OF 2024

KW KIARIE, J

OCTOBER 21, 2025

BETWEEN

THEOPHILUS MUSYOKI MUIA ..... 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. M.K. Mutegi–Principal Magistrate)

JUDGMENT

1. Theophilus Musyoki Muia, 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 diverse dates between April 2018 and the 27th day of May 2018, at (particulars witheld) sublocation, (particulars witheld) East District, within Makueni County, he intentionally caused his penis to penetrate the vagina of M.M., a child aged thirteen years.

3. The appellant was sentenced to serve 20 years' imprisonment in person. He was aggrieved and filed this appeal. He raised the following grounds of appeal:

    a. The trial magistrate erred in law and fact by failing to find that the appellant was not correctly identified as the perpetrator of the offence.

    b. The trial magistrate erred in law and fact by failing to find that the prosecution never proved the age of the complainant's genitalia as required by law.

    c. The trial magistrate erred in law and fact by failing to find that the prosecution never proved the age of the complainant as required in law.

d. That the trial magistrate erred in law and fact by failing to find that the witnesses in this case were incredible witnesses whose evidence could not be used to base a conviction.

e. The trial court magistrate erred in law and fact in convicting the appellant based on the complainant's single evidence without giving a reason for believing the said complainant's testimony.

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

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.

7. M.M. (PW1), the complainant in this case, stated her age as 13 years. The clinical officer who examined her confirmed she was 13 years old. When she testified, the trial court recognised her as a child and conducted a voir dire before she gave her evidence. Although no document was produced, I am satisfied that her age was sufficiently established.

8. On the 27th day of May 2018, TMM (PW2) was informed that the appellant was waiting for the complainant for a pre-planned sexual liaison. He armed himself with a machete and went, accompanied by a dog. It was a moonlit night. The dog led him to a bush where he saw the appellant on top of the complainant. He threw the machete at them. The two fled in different directions. He recognized the appellant.

9. According to her account, the complainant claimed that the appellant defiled her while she was herding cows during the day. She did not report the incident to anyone. In her cross-examination, she stated that the appellant had been hit with a machete while attempting to flee.

10. The appellant denied any involvement with the offence.

11. There was no attempt by the prosecution to reconcile the variance between the evidence of the complainant and that of PW2. This variance raised doubts about who was telling the truth between the complainant and PW2. 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.

12. From the medical evidence, the complainant had previously engaged in sexual intercourse and was one month pregnant at the time of the examination on May 28th 2018.

13. The prosecution did not, therefore, prove that the appellant defiled the complainant. The conviction was unsafe.

14. 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