Nthuli v Republic (Criminal Appeal E050 of 2024)
[2025] KEHC 14718 (KLR) (21 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E050 OF 2024

KW KIARIE, J

OCTOBER 21, 2025

BETWEEN

JONES MWIVA NTHULI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. Case No. E020 of 2021 of the Senior Principal Magistrate's Court at Makindu by Hon. M. Kibe, Senior Resident Magistrate)

JUDGMENT

1. Jones Mwiva Nthuli, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of the offence were that on the 1st day of January 2021, at (particulars witheld) village, (particulars witheld) Sub-County within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of C.M., a child aged seventeen years.

3. The appellant was sentenced to fifteen years' imprisonment and has appealed against both his conviction and sentence. He raised the following grounds of appeal:

    a. The trial magistrate grossly erred in law and fact in relying on suspicious and fictitious evidence of PW1 and without noting that PW1 was subjected to duress, thus incriminating the appellant.

    b. The trial magistrate erred in law and fact in relying on hearsay evidence adduced by prosecution witnesses and failed to note that the charges against the appellant were born out of malice and ill-will.

    c. The trial magistrate erred in law and fact in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubt

without the benefit of a properly conducted deoxyribonucleic acid (DNA) test required under Section 2 of the S.O.A to ascertain whether or not the accused was linked with the commission of the alleged offence.

d. The trial magistrate gravely erred in law and factors in finding the appellant guilty as charged in the absence of corresponding medical evidence of sexual activity on the part of the appellant.

e. The learned trial magistrate failed to properly scrutinize the evidence of prosecution witnesses and to exercise due caution, resulting in a conviction based on flimsy, inconsistent, and insufficient evidence that lacked probative value to justify a conviction.

f. The trial court erred in law and fact without observing that there were no substantive investigations by the I.O., thereby basing the conviction on mere allegations and fabrication. No eyewitness testimony that a person was seen fleeing from the scene of the crime, and no fingerprints or anything found linking the appellant with the commission of the alleged offence. He acted in mala fide while handling the matter.

g. The trial court erred in law and fact by shifting the burden of proof onto the appellant; it is well-established law that an accused person should only be convicted based on the strength of the prosecution's evidence, not on the weakness of his defence.

h. The trial magistrate erred in law and fact by failing to find that the prosecution had not proven its case beyond any reasonable doubt as required by law, and also failed to scrutinize and evaluate the prosecution's evidence, thereby arriving at an erroneous decision.

i. The trial magistrate erred in law and fact as he deliberately overlooked that the witnesses gave false evidence despite the fact that they were under oath to tell the truth, and also overlooked the cross-examination of the defence counsel, which was biased and in favour of the prosecution.

j. The sentence imposed upon the appellant was harsh and excessive based on the circumstances and contravened the provisions of Article 47 of *the Constitution*.

4. The state opposed the appeal through M/s Linet Wataka, learned counsel, on the following grounds:

a. All the offence's ingredients were proven to meet the required standards.

b. The sentence is the prescribed one.

5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs the Republic [1972] EA 32.

6. To establish an offence of defilement against an accused person, the prosecution has to prove the following ingredients:

a. That there was penetration of the complainant’s genitalia;

b. That the accused was the perpetrator and

c. The victim must be below eighteen years old.

This position was echoed in the case of Fappyton Mutuku Ngui vs Republic [2012] eKLR. Ngugi J. (as he was then) said:

Going by this definition of defilement... the issues the court needs to determine...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.

Therefore, I will endeavour to establish whether the prosecution met the required standards.

7. The complainant, C.M. (PW1), stated that she was seventeen at the time of the alleged offence. A copy of her Birth Certificate was produced, indicating that she was born on 26 November 2003. As of 1 January 2021, she was 17 years and 1 month old. I find that her age, for Section 8(4) of the *Sexual Offences Act*, has been proven.

8. The medical evidence was adduced by Dr. Erastus Kakundi (PW3) on behalf of his colleague, Caroline, who examined the complainant on January 2 2021. There were soil particles in the vulva, and the hymen was broken. I find that penetration was proved.

    1. The complainant recounted the events that led to the unfortunate ordeal she experienced. While returning home from a barber's shop in (particulars witheld), a boda-boda rider with a pillion passenger stopped beside her. He called her by name and extended his hand for greetings. After she greeted the duo with a handshake, she did not know what happened next. Apparently, she was stunned and followed the instructions given in a dazed manner. The appellant was the rider. She was asked to board the motorcycle, and she was taken to a bar.

    2. They sat in an open area, and the appellant went inside the bar and returned with two glasses which had some liquid. She was given the glass with some black liquid, and she got drunk. She remembered vaguely being abandoned along the road.

    3. J.K.K. (PW2) is her mother. Her evidence was that at about 10 p.m., a neighbour called her and informed her that the complainant had been abandoned by the roadside. When she went to the scene, she found her partially naked and semiconscious. She kept repeating the names "Kimani" and "Kaseti". Kimani was identified as the appellant. They took her to the hospital. This evidence was further confirmation that the complainant was defiled.

    4. Jones Mwiva Nthuli, the appellant, denied any involvement in the offence.

    5. The proviso to section 124 of the *Evidence Act* states:

        > Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

14. In this case, I find that the evidence on record confirms that the complainant told the truth. The appellant was not a stranger to her. The appeal against the conviction lacks merit and is dismissed.

15. An appellate court would interfere only where there exists, to a sufficient extent, circumstances entitling it to do so. Nillson vs Republic [1970] E.A. 599 as follows:

    > The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the

> Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364.

16. Section 8(4) of the *Sexual Offences Act* provides:

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

17. The appellant was sentenced to the minimum prescribed sentence. I have no reason to interfere with it. The appeal of the sentence is dismissed as well.

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

KIARIE WAWERU KIARIE

JUDGE