Kaumbuthu v Republic (Criminal Appeal E081 of 2023)
[2025] KEHC 15172 (KLR) (27 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15172 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E081 OF 2023

HM NYAGA, J

OCTOBER 27, 2025

BETWEEN

JULIUS KAUMBUTHU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. R. ONGIRA (S.R.M.) in Tigania Principal Magistrates Court Sexual Offences case No. E012 of 2022 delivered on 12th May 2023 and Sentence Ruling delivered on 31st May 2023)

JUDGMENT

1. The appellant was charged before the Principal Magistrate's Court at Tigania with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.

2. The particulars of the offence are that on diverse dates between 10th November 2022 and 12th November 2022, at[Particulars Withheld], Kiguchwa Location in Tigania Central Sub- County, within Meru County, he intentionally caused his penis to penetrate the vagina of R.M. , a child aged 9 years.

3. The accused was also charged with an alternative count of indecent act with a child contact to section 1(1) of the *Sexual Offences Act*.

4. The particulars of this count are that on the same dates and place he intentionally touched the vagina of R.M. a child age 9 years with his penis.

5. After a full trial the accused person was convicted on the principal count and was sentenced to life imprisonment.

6. Aggrieved by the said conviction and sentence, the appellant filed an undated petition of appeal in which he put forth the following grounds.

a. That, the learned trial magistrate erred in matters of law and fact by failing to note that the evidence adduced was not sufficient to sustain the conviction.

b. That, the learned trial magistrate erred in law and facts by failing to note that he charges were frame-up because of grudge.

c. That, the learned trial magistrate erred in law and facts by failing to note that the evidence of broken hymen is not proof of defilement.

d. That, the learned trial magistrate erred in law and facts by failing to note that the sentence was harsh and excessive.

e. That, the learned magistrate erred in law and facts by not observing that the evidence adduced by the prosecution witnesses were un-collaborating and inconsistence.

f. That, the learned trial magistrate erred in both law and facts by failing to note that the testimony of the complainant contradicts the evidence of the expert (doctor).

g. That, the learned trial magistrate erred in both law and facts by failing to note that no independent witness in this matter to clear doubts.

h. That, the learned trial magistrate erred in both law and facts by failing to note that no independent witness in this matter to clear doubts.

i. That, the learned trial magistrate erred in law and fact by rejecting the appellant defence without giving any cogent reason.

j. That, since I cannot recall all what happened during the trial, I wish to be availed with the trial proceeding and Judgment to draft more cogent grounds.

7. The appellant thus prays that the appeal be allowed and he be set at liberty.

8. When the appeal came up for directions the court directed the parties to file their submissions. At the time of writing this judgment, only the respondent's submissions were on the court record.

Respondent's submissions

9. It was submitted that the prosecution had established its case to the required standard.

10. On the age of the victim, the respondent submitted that this was established with the production of the age assessment.

11. It was further submitted that the complainant had clearly stated how the offence occurred. That the appellant had asked her to accompany him to his house. That the appellant had defiled the complainant several times. That the complainant was in pain and this caused her to inform her mother. That the clinician who examined the complainant noted that the vaginal region was reddish and the hymen was freshly torn. The patient was also given antibiotics.

12. Based on the above, the respondent argues that there was sufficient proof of penetration.

13. On identification, it was submitted that the complainant knew the appellant well and duly identified him, which led to his arrest.

14. On the sentence meted upon the appellant, it was submitted that the same was after consideration that the offence is rampant, that the complainant was a child of tender years who was defiled several times.

15. The respondent urged the court to dismiss the appeal and uphold the sentence.

Analysis and determination

16. Being a first appeal, the court's duty is as was set out in Okeno -vs- Republic (1972) EA 32 where it was held that:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion."

17. Similarly, in Kamau Njoroge vs Republic [1987] eKLR, the Court of Appeal stated:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

18. It is thus this court's duty to consider the evidence adduced and arrive at its own independent conclusion.

19. The ingredients of the offence of defilement were restated in the case of Dominic Kibet Mwareng vs Republic Criminal Appeal No 155 OF 2011, where the learned judge noted that:

> " The critical ingredients forming the offence of defilement are; the age of the complainant, proof of penetration and positive identification of the assailant"

20. With the above in mind, I will now look at the evidence adduced before the trial court.

21. PW1 was the complainant. After voire dire examination, her was evidence that on the material day, at 4:00pm the accused person called her to his house and proceeded to undress her then made her lie on the bed where after the accused person also climbed the bed, undressed and he inserted his penis into her vagina. She further stated that that wasn't the 1st time that the accused person had done the same act to her. She added that she experienced intense pain and so she reported the matter to her mother and the matter was reported at Mikinduri Police Station. She was also treated. She denied that she had been asked to tell lies before court.

22. PW2 was PC Fillister Mwema. Her evidence was that on 13/11/2022 at 11:30 hours a defilement case was reported by PW1 in the company of her parents. She investigated the matter and escorted the minor to Mikinduri Hospital where the PRC form and P3 form were filled. She also recorded witness statements where she established that the accused person defiled PW1 on 10/11/2022 at 1600 hours., on 11/11/2022 and 12/11/2022. PW2 stated further that she visited the scene and established that the accused person's home is 50 meters away from the complainants' home.

    In cross exam, PW2 stated that the accused person was bought to the station by the parents of the PW1.

23. PW3 was Absalom Wambua, a clinician from Mikinduri Sub- County Hospital. He produced the following documents in respect to the complainant;

    i. PRC form as exhibit 1,

ii. Certified treatment notes for PW1 as exhibit 2,

iii. P3 form for PW1 as exhibit 3,

iv. Age assessment report dated 14/11/2022 as exhibit 4,

v. Certified copy of accused person's treatment notes as exhibit 5 , and

vi. P3 form for accused as exhibit 6.

24. The witness further stated that when PW1 was examined her vagina was reddish and the hymen was torn. A high vaginal swab showed blood stains. From the lab test it was concluded that PW1 had an infection but the kind of infection that she had couldn't be substantiated. He stated that PW1's hymen was freshly torn. The age of injury was one day. The weapon that caused the injury was male reproductive organ which penetrated PW1's vagina. The age assessment showed that patient was 9 years old.

25. The witness further stated that the examination on the accused person never showed anything that was significant.

26. In his sworn evidence, accused person stated that the charges leveled against him are false and that he's innocent. He further stated that the case herein was fabricated against him as he used to help the mother of the complainant brew illicit brew and that the complainant's father, on finding out, was furious as he was against his wife brewing illicit brew.

27. The appellant further stated that on the day of his arrest, he had gone to buy sugar for putting in the illicit brew. That the complainant's father tricked him in helping him catch something and instead, descended on the accused person assaulting him. When PW1 returned home, she was asked to say what she had been told and she claimed that the accused person had defiled her, a narrative that was false.

28. He refuted the doctor's evidence and that of the police stating that they were not present to witness what had transpired.

29. From the evidence adduced there is no dispute as to the age of the complainant. That was duly established by the age assessment report tendered as an exhibit.

30. The next element for consideration is that of penetration. 'Penetration' is defined under section 2 of the *Sexual Offences Act* to mean;

> 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'.

31. For purposes of the Act, genital organs are defined under section 2 as follows;

> " genital organs" includes the whole or part of male or female genital organs and for purposes of this Act includes the anus"

32. The evidence of the complainant was that the appellant undressed her, then himself and proceeded to insert his penis into her vagina.

33. The complainant was examined shortly after the alleged incident. Her vaginal region was reddish. Her hymen was freshly broken. A high vaginal swab revealed blood stains. The clinician confirmed that there was evidence of penetration.

34. The appellant contends that the broken hymen is not proof of penetration.

35. While it is accepted that a broken hymen does not necessarily mean that there has been sexual penetration, such evidence must be considered in the context of each case. In the instant case it is to be considered alongside the evidence of the victim and in doing so, the same clearly points to penetration as defined by the Act.

36. The complainant's evidence is thus corroborated by medical evidence to prove the act of penetration.

37. The appellant also stated that the prosecution witnesses were inconsistent and did not corroborate the complainant's evidence.

38. The term corroboration does not imply an eyewitness as the appellant seems to suggest. It is not every offence that is committed in front of witnesses, more so, an offence of this nature. It is thus erroneous to require an eye witness to corroborate such an occurrence.

39. Section 124 of the *Evidence Act* deals with evidence of children. It provides as follows;

> " 124. Corroboration required in criminal cases.
>
> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> 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. "

40. Therefore, under the proviso above, a court can convict based on the evidence of the victim alone. This position has been confirmed by the superior courts. For instance, in the case of Stephen Nguli Mulili v Republic [2014] eKLR the Court of Appeal held;

> " With regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

41. That position was reaffirmed in the case of JWA Vs. Republic [2014] eKLR where the same court observed as follows: -

> " We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

42. The record shows that the magistrate who recorded the evidence of the complainant duly conducted the voire dire examination. The learned magistrate examined the complainant's evidence in detail and concluded that she was consistent in the chronology of the events of that material day.

43. I have also examined that evidence and I find that the complainant's evidence was indeed consistent and free of contradictions. She narrated how the appellant undressed her, then himself and lay on top of her. He then inserted his penis into her vagina. It was not necessary for the victim to go into further graphic details. She then alerted her mother.

44. Even though the complainant's parents did not testify, I don't think that is a fatal omission, since they were not at the scene. The investigating officer confirmed that they are the ones who took the accused to the police station.

45. On the identification of the perpetrator of the offence, there is no doubt that the complainant knew the appellant well. She was clear that it was the appellant, and no one else, who defiled her. The appellant conceded that he was known to the complainant who she referred to as MXXXXde, and her family. I find that the appellant was properly identified.

46. The appellant also contended that his defence of a grudge was not considered. The appellant's defence was that he was framed by the complainant's father because of his relation with his wife. That the complainant's father is the one who told the complainant what to say.

47. The complainant denied that allegation during her testimony.

48. Looking at the evidence I am not in agreement with the appellant. Is he saying that the complainant's father deliberately hurt his own daughter just to fix him? Just like the trial court did, I find that line of defence to be an afterthought.

49. Having looked at the evidence adduced I find that the prosecution proved all the ingredients of the offence and that the appellant was properly convicted. I uphold the conviction.

50. I will now deal with the sentence.

51. The penalty for the offence is prescribed under section 8(2) of the Act. It states as follows;

> 8(2) 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.

52. The appellant submits that the sentence meted out was harsh.

53. It is trite law that sentencing is at the discretion of the trial court, unless there is a mandatory sentence prescribed by law, save for cases affected by the decision in Francis Karioko Muruatetu and others vs Republic (2017) eKLR.

54. The question of the sentences provided for in the *Sexual Offences Act* was considered by the Supreme Court of Kenya in Petition No. E018 of 2023 Republic Vs Joshua Gichuki Mwangi (Respondent) & Initiative for strategic litigation in Africa & 3 others (Amicus curia) delivered on 12th July,204. The apex court held as follows: -

> "(51) In light of the structural and supervisory interdicts issued, the Court issued the Muruatetu Directions, wherein it, inter alia, pronounced itself on the application of its decision in the Muruatetu Case to other statutes prescribing mandatory or minimum sentences as follows: "

10. It has been argued in justifying this state of affairs, that, by paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it. In that paragraph, we stated categorically that:

> "[48] Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be SC Petition No. E018 of 2023 26 regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under article 25 of *the Constitution*; an absolute right".
>
> Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to section 204 of the Penal Code and it is the mandatory nature of death sentence under that section that was said to deprive the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases

11. The ratio decidendi in the decision was summarized as follows:

> "69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
>
> We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute." .....

14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent

with *the Constitution*. It bears restating that it was a decision involving the two petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the petitioners, and as framed by the court.

15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases." [Emphasis ours] ....."

55. It goes without saying that the said decision in now binds all other courts. Therefore, the trial court was correct to mete out the prescribed sentence, that of life imprisonment.

56. In conclusion, I find that the appeal lacks merit and it is dismissed.

DATED, SIGNED & DELIVERED AT MERU THIS 27TH DAY OF OCTOBER, 2025.

H. M. NYAGA

JUDGE