Muthomi v Republic (Criminal Appeal E081 of 2024)
[2025] KEHC 16578 (KLR) (13 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16578 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E081 OF 2024

HM NYAGA, J

NOVEMBER 13, 2025

BETWEEN

FREDRICK MUTHOMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of Hon. E.W. Ndegwa (S.R.M.) in Meru Chief Magistrates Court Sexual Offences Case No. E037 of 2023 delivered on 2nd August 2024)

JUDGMENT

1. The appellant was charged before the Chief Magistrate's Court at Meru with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that on the 23rd day of August 2023 at Naari Location, Buuri sub-county within Meru County, he intentionally caused his penis to penetrate the anus of D.M., a child aged 13 years.

2. The accused was also charged with an alternative count of indecent act with a child contact to section 1(1) of the Sexual Offenses Act. It is alleged that on the same day and place he intentionally touched the anus of D.M. a child age 13 years with his penis.

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

4. Aggrieved by the said conviction and sentence, the appellant filed a petition of appeal dated 6th August 2024 in which he put forth the following grounds.

    a. That the Learned Magistrate erred in law and in fact in convicting the appellant on an offence which had not been proved beyond reasonable doubt.

b. That the Learned Magistrate erred in law and in fact in convicting the appellant on uncorroborated evidence.

c. That the Learned Magistrates erred in law and in fact in failing to warn herself in relying on the evidence of a single witness to convict the accused under section 24(sic) of *Evidence Act*.

d. That the Learned Magistrate erred in law and in fact in convicting the appellant on insufficient evidence and against the weight of evidence.

e. That the Learned Magistrate erred law and in fact in sentencing the Appellant excessively.

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

6. When the appeal came up for directions the court directed the parties to file their which are summarized as follows.

Appellant's Submissions

7. The appellant submitted that no one else apart from the complainant witnessed the appellant sodomize him. That in the absence of an eyewitness it was important of the court to warn itself of the danger of convicting the appellant while relying on the evidence of a single witness under section 24(sic) of *Evidence Act*. That nowhere on the court record did it warn itself of such danger. That the learned magistrate who convicted the accused person did not participate in the prosecution case and therefore she had no benefit of assessing the demeanor of the witness to conclude that his evidence was truthful.

8. It was further submitted that the complainant's evidence had several gaps. That first, he said he was pushed to the ground and after removing the shorts the appellant removed his and lay on top of him. That he does not state whether there was any struggle or not nor the position which he lay on the ground. That it was important to consider all these facts because a boy of 14 years is a big person who cannot be easily subdued. That he did not state clearly that he was sodomized as he only stated that what was done to him was tabia mbaya. That this term can mean different things other than what the magistrate assumed.

9. It was further submitted that the complainant testified that he had informed one M of the incident but that named person was not called as a witness.

10. It was further submitted that although the doctor's report was to the effect that the complainant's anus had bruises, no fluids were noted. That it is not clear from the evidence on record whether the appellant used a condom or why there was no fluid seen in the complainant's anus. That this could mean that the bruises were caused by other activities other than sexual assault as alleged by the complainant.

11. The appellant thus submits that the conviction was unsafe.

12. On the sentence, it was submitted that the appellant did not mitigate on it because he was sure he did not commit the offence. That the conviction was unsafe and an innocent person was wrongly jailed.

13. Citing the Blackstone's Principle, the appellant stated that it is better for the court to acquit ten criminals than to jail one innocent person.

Respondent's Submissions

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

15. On the age of the victim, the respondent submitted that this was established with the production of his birth certificate as an exhibit.

16. On penetration, it was submitted that the complainant had clearly stated how the offence occurred. That the appellant is said to have been armed with a knife and that he threatened the complainant after the incident. That the complainant was in pain and this caused him to report the matter to PW 2, the area manager who then informed his mother. That the Doctor who examined the complainant noted that there were bruises around the anus region. The patient was also given post exposure prophylaxis to prevent HIV infection and antibiotics.

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

18. On identification, it was submitted that the complainant knew the appellant well and duly identified him. That the area manager testified that the compliant mentioned the appellant as the person who had committed the alleged offence, which led to his arrest.

19. On the sentence meted upon the appellant, it was submitted that the same was after consideration of the aggravating circumstances such as the age of the complainant, threats to him and the trauma occasioned upon him. That it was worth noting that the offence was committed on the minor's birthday which will have an impact on him each year for the rest of his life.

20. It was further submitted that at mitigation the appellant did not express any remorse for his sordid actions and that the life sentence was meted in order to deter others and for retribution for the victim whose life has been negatively impacted by the depraved actions of the appellant.

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

Analysis and Determination

22. 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."

23. 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."

24. It is thus the duty of this court to consider the evidence adduced and arrive at its own independent conclusion.

25. 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."

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

27. The complainant testified that on the material day he was with the appellant, with whom they had worked that morning. They then went to fetch water. On their way back, the appellant pushed him to the ground, removed his trouser, then his and then he lay on top of him. The appellant then inserted his penis into his anus. After he was done, the appellant warned him not to tell anyone, but a day later he informed one M, who advised him to alert the sub area manager, who alerted his mother. He was then taken to hospital.

28. PW2 was Stanley Mutunga, the said area manager. He testified that the complainant went to his home and reported the incident. He alerted the victim's mother and then advised her to take the complainant and to the police.

29. Dr. Linah Nkonge was PW3. She produced the medical documents filled by her colleague, one Dr. Roy Kaberia. She noted the contents of the PRC Form and the P3 Form, which included the bruises noted on the patient's anus. No discharge was noted. The patient was provided with post exposure prophylaxis and antibiotics.

30. PW4 was police constable Julius Mutuku. He narrated how the report of the alleged offence was made and processed by the police. He produced the complainant's birth certificate as an exhibit.

31. In his sworn evidence the appellant confirmed that he was working with the complainant on the material day, but denied the offence. He testified that he had wanted to sell his cow to one M, who paid a deposit. That the complainant's mother asked him to lend her Ksh. 3000/- but he declined as he had already budgeted for the money. That the complainant's mother then offered to have sex with him as a confirmation that she would repay the money but he rebuffed her overtures. She left him, disgusted.

32. From the evidence adduced there is no dispute as to the age of the complainant. That was duly established by the birth certificate tendered as an exhibit.

33. 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.'

34. 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."

35. Therefore, penetration of the anus if proved is sufficient to warrant a conviction for the offence of defilement.

36. The appellant contends that the evidence relied upon by the trial court was unsafe as it was not corroborated.

37. 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.

38. 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.

39. 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."

40. That position was also 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."

41. The trial court record shows that the magistrate who recorded the evidence of the complainant duly conducted the voire dire examination. The magistrate who convicted the accused did not hear the evidence of the victim as she took over the conduct of the case and under section 200 of the Criminal Procedure Code, the appellant opted to have the case continue from where it had reached before the previous magistrate. The learned magistrate did examine the complainant's evidence in detail and concluded that he was consistent in the chronology of the events of that material day.

42. I have examined that evidence and I also find that the complainant's testimony was consistent and free of contradictions. He narrated how the appellant undressed him, then himself and lay on top of him. He was also categorical that the appellant inserted his penis into his anus. He did not use the words tabia mbaya only, and even if he did so, in the circumstances of the case it is easy to decipher what the words meant. It was not necessary for the victim to go into graphic details such as to the position he lay as the appellant defiled him.

43. The evidence of the complainant was actually corroborated by the medical evidence tendered by the doctor. The bruises around the anus were found to be consistent with sexual assault. The appellant submitted that no fluids were observed. It is not necessary to find these fluids, whatever that means. The complainant was not examined immediately after the incident so such fluids would have not been found. If the fluids referred to was semen, there are authorities that have reiterated that it is not

mandatory that semen be found in order to prove penetration. For instance, in Mark Oiruri Mose Vs R (2013) eKLR the Court of Appeal stated thus:

> " Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

44. From the evidence adduced before the trial court, I am of the considered view that there was ample proof of penetration as defined by the law.

45. On the identification of the perpetrator of the offence, there is no doubt that the complainant knew the appellant well. He was clear that it was the appellant, and no one else, who defiled him. The appellant conceded that he was with the complainant that day.

46. I find that the appellant was properly identified.

47. The appellant's defence was that he was framed by the complainant's mother after he refused to lend her money and also refusing to have sex with her. The complainant's evidence was that he did not tell his mother about the incident. She learnt about it from the area manager (PW2).

48. Is the appellant suggesting that the complainant's mother intentionally bruised her own son, then put him through the ordeal of having to be taken to hospital and take the prescribed medicine? I don't think so. 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 same.

50. I will now deal with the sentence.

51. The penalty for the offence is prescribed under section 8(3) of the Act. It states as follows;

> " (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

52. The appellant submits that the sentence meted out was harsh and that he did not mitigate because he did not commit the offence.

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 other Vs Republic (2017) eKLR.

54. The trial court gave the appellant the opportunity to mitigate but he spurned it. The trial court noted that the appellant was not remorseful and that he defiled the complainant on his birthday.

55. Just as the trial court found and as the respondent submitted, this will be a permanent scar on him whenever that day reaches. The court had the discretion to mete out any custodial sentence, from twenty years upwards. I cannot fault the trial court for the sentence it meted upon the appellant. He took advantage of a lad that he knew well. He should not have expected any mercy.

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

DATED, SIGNED & DELIVERED AT MERU THIS 13TH DAY OF NOVEMBER, 2025.

H. M. NYAGA

JUDGE