Muthoni v Republic (Criminal Appeal E051 of 2024) [2025] KEHC 16013 (KLR) (4 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16013 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E051 OF 2024

NIO ADAGI, J

NOVEMBER 4, 2025

BETWEEN

JAMES KIMUYU MUTHONI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against judgment delivered on conviction and sentence by Hon. D. N Sure (PM) on 27th March 2024 in CM's Court at Kangundo Case No. S.O E023 of 2023)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *akn ke act 2006 3 Sexual Offences Act* No. 3 of 2006. The particulars of the charge are that on diverse dates in the month of September 2022 in Kangundo Sub-County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of MM (name withheld) a child aged 17 years in violation of section 8(1) as read with section 8(4) of the Sexual Offence Act No. 3 of 2006.
2. He was charged in the alternative with the offence of Committing an Indecent Act with a child contrary to section 11(1) of the *akn ke act 2006 3 Sexual Offences Act* No. 3 of 2006. The Particulars of the charge are that on diverse dates in Kangundo Sub-County within Machakos County intentionally and unlawfully touched the vagina of MM (name withheld) a child aged 17 years with his penis contrary to section 11 (1) of the *akn ke act 2006 3 Sexual Offences Act* No. 3 of 2006.
3. The Appellant pleaded not guilty to the main charge and to the alternative charge and the matter was set down for hearing. The prosecution called four witnesses in proving its case.
4. The Appellant gave sworn defence evidence and was the only witness.

5. Upon considering the evidence placed before the trial court, the Appellant was convicted of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *akn ke act 2006 3 Sexual Offences Act* and sentenced to 15 years in prison on 27th March 2024.

6. Being dissatisfied with the decision of the trial court, the Appellant has lodged the instant appeal against both the conviction and sentence. The Appellant's Memorandum of Appeal dated June 2024, the Appellant raises 4 grounds of appeal as follows:-

   a. That, the learned trial magistrate erred in matters of law and facts by failing to find that the whole of the prosecution's case was marred by explicit inconsistencies and contradiction which vitiated on the overall burden of prove.

   b. That, the learned trial magistrate erred in matters of law and facts by failing to find that essential witnesses were not procured to corroborate the prosecution's case thereby leaving a waging gap which ought to have been resolved in favour of the Appellant.

   c. That, the learned trial magistrate erred in matters of law and facts by not giving regard to the defence of the accused person which exonerated him from the offence charged with.

   d. That, the learned trial magistrate erred in matters of law and facts to mete maximum sentence to the accused person where he did not exercise his powers of discretion as per the latest jurisprudence

7. The Appellant prays that the appeal succeeds in its entirety, conviction quashed and sentence set aside.

8. The Respondent oppose the instant appeal and argue that the trial court properly evaluated the evidence and came to the right conclusion.

9. As a first appellate Court, I have also subjected the evidence adduced before the trial magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See Okeno v. Republic [1972] EA 32.

10. Both the Appellant and Respondent filed their respective submissions which I have duly considered.

11. To sustain a conviction for the offense of defilement, the prosecution has to prove three ingredients. This was set out in Charles Wamukoya Karani v Republic, Criminal Appeal No. 72 of 2013. The Court in that case stated:

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

12. The facts of the case according to the prosecution are that the complainant (PW1) testified that she met the Appellant when he was constructing a house. On the fateful day she was with her friend Nzula going to church. They went to the Appellant's house. Nzula stayed in the sitting room and the Appellant and herself went to the bedroom. PWI stated that the Appellant did bad things (vituko) to her. He forced her to sleep with him. She resisted but the Appellant removed her underwear by force and had sex She stated that he inserted his penis in her vagina. PW1 also stated that it happened a second time. This time she was heading for church games and the Appellant asked her and Nzula to meet home at Manyatta grounds. Nzula declined to go but she went and and the Appellant took her to the bushy. PWI testified that in March 2023 the deputy principal called her and summoned her parents. Her mother PW3 went to school then she was taken to the hospital where she was found to be pregnant.

13. PW2 testified that one of the teachers reported to him that they suspected PWI to be pregnant. He summoned the parents and when the mother (PW3) came he informed her of their suspicion and directed that she takes her to the hospital for a test. He also testified that himself, a female teacher and her mother questioned PW1 about it. PW3 corroborated the evidence of PWI and PW2. PW4 was the Clinical Officer who examined the Complainant (PWI) aged 17 years and 9 months. Upon examination she found she was 8 months pregnant.

14. During the course of the trial, the Complainant gave birth. PW5 testified that the Complainant, the Appellant and the child born by the Complainant were taken to the Government Chemist for DNA testing. PW5 testified that the DNA report shows that the Appellant was the biological father of the child and produced the report as an exhibit before the court.

15. In his defence, the Appellant admitted to the offence. He admitted that he was in a relationship with the Complainant. He did not know the Complainant was a schoolgirl because she told him she had finished school and was a house girl. She was dressed like an adult and had an adult hair style. The Appellant couldn't know the Complainant was underage. In the relationship, the Complainant became pregnant and gave birth. The Appellant prayed for forgiveness and invited the trial court to note that there is a child who requires his assistance and that he would take care of the child.

16. On cross examination, the Appellant stated that he had lived with the Complainant for about a year and she had a waiting card but he didn't know where the Complainant got the waiting card from.

17. With this admission, 2 ingredients were proved, namely that the Complainant was defiled as there was penetration which resulted into pregnancy and the birth of a child. Further that the perpetrator of the defilement was the Appellant.

18. As regards the age of the Complainant, the prosecution's case is that she was 17 years 9 months old (Just a month remaining for her to attain the age of majority) at the material time and her Birth Certificate showing that she was born on 25 08 2005 was produced in evidence as PExt.4.

19. Although the trial court stated that it was not convinced that the Complainant had an affair with the Appellant or that she duped him into having a sexual relationship with her. The Complainant stated that the first encounter, she resisted and called out to Nzula but the Appellant had sex with her regardless. On the second encounter, the Complainant stated that she resisted and threatened to scream but the Appellant persuaded her not to scream and still had sex with her. These are not actions of a consensual relationship.

20. Further, on the issue of Nzula, the Complainant stated that she was stopped from testifying by her father. The court in its summation, stated that the Appellant took advantage of the Complainant whom he knew was a student and proceeded to have unprotected sex and is now seeking to avoid legal repercussions by proposing to maintain the child.

21. Belief that a Complainant is an adult is a defence under Section 8 (5) of the SOA which provides as follows.

    (5) It is a defence to a charge under this section if—

        a. it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and

        b. the accused reasonably believed that the child was over the age of eighteen years.

(6) The belief referred to in subsection (5)(b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the Complainant.

22. Looking at the testimony of the Complainant, she did not at all give the name of her school and in which class she was. The Headteacher (PW2), equally did not provide proof that the Complainant was a pupil at the said [Particulars Withheld] Secondary School in Form 2 as alleged. On cross examination, the Headteacher stated that they did offer guidance and counselling to their students. There are students who would adhere to the advice while others will not. The Complainant is among the students who did not adhere to the guidance. This gives a true picture of the Complainant's character and the probable reason as to why Nzula's father stopped her from coming to testify in court. It is also to be observed that on the second time the incident allegedly happened, the Complainant was heading for church games and the Appellant asked her and Nzula to meet him at his home at Manyatta grounds. Nzula declined to go but the Complainant went and the Appellant took her to the bush and they had sex.

23. A witness in a criminal case upon whose evidence it was proposed to rely should not create an impression in the mind of the court that he was not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicated that he she was a person of doubtful integrity, and therefore an unreliable witness which made it unsafe to accept his her evidence. The evidence of PW1, properly evaluated, would have been in the category of an unreliable witness.

24. In the case of Meshack Nyongesa v Republic [2016] eKLR, the Court of Appeal had occasion to consider the defence under Section 8(5) of the SOA and stated:

> " Section 8(5) of the *akn ke act 2006 3 Sexual Offences Act* provides a complete defence to a charge of defilement if it is shown that the accused believed that the child was 18 years or above"
>
> The learned judges went on to state:
>
> " We take judicial notice of the fact that these days, children, especially females, appear older than they actually are. In the circumstances, given the fact that this is a defence which few non-lawyers know about, it is our considered view that where a young man is charged with defiling a girl child above the age of 16 years, the trial court should ascertain whether he had reason to believe that the girl was 18 years or above".

25. In High Court criminal appeal No. 32 of 2015 at Malindi, Martin Charo vs the State it was held:

> " It is true that under the *akn ke act 2006 3 Sexual Offences Act*, a child below 18 years cannot give consent to sexual intercourse. However, where the child behaves like an adult and willingly sneaks into men 's house for purposes of having sex, the court ought to treat that child as a grown-up who knows what she is doing. "

26. The Appellant herein raised the defence under Section 8(5) of the SOA that he believed that due to the Complainant telling him she had finished school and was working as a house help and that surprisingly she presented to him a copy of her ID waiting card which the Appellant did not know where she had gotten it from was enough for the Appellant to believe the Complainant was an adult.

27. The onus is always upon the prosecution to clear any doubts that may arise, failure to which the benefit would go to the Appellant. Had the trial court considered this defence, it may not have convicted the Appellant. Accordingly, I find that the trial court erred in failing to consider the Appellant's defence.

28. In addition, the record shows that the Appellant was not cross examined further on details about him having lived with the Complainant for about a year and or on the ID waiting card that the Complainant had shown him. It is my considered view that the Appellant indeed took steps ascertain the age of the Complainant.

29. In the end, after re-analysing and re-evaluating the evidence presented before the trial, my finding is that the Appellant ought to have benefitted from the defence under Section 8(5)(b) which he raised before the trial court. In the premises, I quash the conviction and set aside the sentence. The Appellant is hereby set at liberty unless otherwise lawfully held.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 4TH NOVEMBER 2025

NOEL I. ADAGI

JUDGE

Delivered Virtually On Teams At Machakos This 4Th November 2025

In the presence of:

Appellant in person

Ms. Agatha Abang for State

Milly- Court Assistant