Mutugi v Republic (Criminal Appeal 96 of 2020)
[2025] KECA 2198 (KLR) (11 December 2025) (Judgment)

Neutral citation: [2025] KECA 2198 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 96 OF 2020

K M'INOTI, A ALI-ARONI & PM GACHOKA, JJA

DECEMBER 11, 2025

BETWEEN

KENNETH MWENDA MUTUGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Chuka (Limo, J.) dated 18th February 2019 in HCCR.A. No. 10 OF 2017)

JUDGMENT

1. On 18th January 2017, the Chief Magistrate's Court at Chuka convicted the appellant, Kenneth Mwenda Mutugi for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*, 2006 and sentenced him to life imprisonment. He was acquitted of an alternative count of indecent act with a child contrary to section 11(1) of the same Act. The appellant was aggrieved and appealed to the High Court at Chuka against both conviction and sentence, but his appeal was dismissed vide a judgment dated 18th February 2019.

2. The particulars of the offence for which the appellant was convicted stated that on 27th September 2015 at Tharaka Nithi County, he caused his genital organ to penetrate that of JK, a girl aged 11 years. After the appellant pleaded not guilty, the prosecution called four witnesses to testify against him.

3. The substance of the prosecution evidence was that on the material day, JK's mother had travelled and left JK and her two younger siblings under the care of their elder brother. At night, JK and her younger siblings were sleeping in the same bed in their single room when the appellant crept in and defiled her. The other children were fast asleep, and when she attempted to scream, the appellant held her by the neck and threatened to kill her. The elder brother was not home at the material time.

4. JK's mother returned early in the morning and found the door open and JK lying on her back, spread-eagled, and upon inquiring what had happened, JK informed her that she had been defiled by the

appellant. JK testified that she knew the appellant because he was a neighbour, and saw him clearly from the light emanating from his phone and a torch which he was using to see around. JK's mother and JK testified that she was 11 years old at the time of the commission of the offence and in class 3. Her birth certificate was also produced in evidence, which showed she was born on 4th October 2004.

5. The offence was reported at Kathwana Chief's Camp and JK was treated, first at Kajuki Dispensary and later at Chuka General Hospital. Medical evidence showed that JK had lacerations on her vaginal walls. The hymen was broken and blood was oozing from the vaginal walls. Subsequently, the appellant was apprehended and charged with the offence.

6. Upon being put on his defence, the appellant gave an unsworn statement and called two witnesses. The appellant testified that the case against him was fabricated because of a land dispute. He claimed that his father had sired a child with JK's mother and that upon the death of his father, JK's mother claimed land from his family, which he refused to accede to.

7. Frankline Kanampiu (DW2) was a former chief of the appellant's location. His evidence was that he knew nothing of the defilement case, but he was aware that the JK's family had demanded some land from the appellant's family. He confirmed that the appellant and JK were neighbours with their homes about 30 meters apart.

8. The other witness called by the appellant was his mother, JK (DW3), who confirmed that they were neighbours with JK's family, separated only by a road. She testified that JK's mother had "snatched" her husband and given birth to a child and that the case against the appellant was fabricated. On cross-examination the witness confirmed that JK was at her home alone on the material night.

9. After considering the evidence, the trial court concluded that the prosecution had proved beyond reasonable doubt that JK was 11 years old at the material time; that she had been defiled; and that it was the appellant who had defiled her. The court rejected the appellant's defence, noting that in his cross- examination of JK's mother, he did not put the alleged fabrication to her; that the child allegedly sired by JK's father was not even named; and that, other than the appellant's mother, the other witness, the former chief did not corroborate that aspect of the defence evidence. Accordingly, the High Court dismissed the appellant's first appeal and upheld the findings of the trial court.

10. In the present appeal, the appellant impeaches the judgment of the High Court on the basis of a memorandum of appeal dated 27th August 2025, in which he has set out only one broad ground of appeal, namely, that the first appellate court erred by upholding the findings of the trial court that the prosecution had proved its case beyond reasonable doubt.

11. The appellant's learned counsel, Mr. Mbarire relied on written submissions dated 27th August 2025, and submitted that the High Court failed in its duty to re-evaluate the evidence and merely rehashed it. He relied on the decision of this Court in Mwanyengela v. Republic [2024] KECA 561 (KLR) on what re-evaluation and analysis of evidence entails.

12. Counsel further argued that the particulars of the alternative charge of indecent act with a child alleged that the appellant touched JK's breast and vagina, but JK testified that the appellant inserted his penis in her vagina and did not touch any other part of her body. Counsel urged that the particulars of the second count were either the work of PW4 or JK's mother and that those particulars, which did not agree with JK's evidence, gave credence to the appellant's defence that the case against him was fabricated. In counsel's view, the two courts below erred in dismissing the defence as an afterthought.

13. It was the appellant's further submission that JK's defilement was not medically proved because the medical report was produced by the investigating officer in violation of section 133 of the *Evidence Act*.

The appellant cited Chaol Rotil Angela v. Republic [2001] eKLR in support of the submission and added that the conviction was not safe.

14. Turning to recognition of the appellant, it was submitted that JK did not say that she recognised the appellant's voice. As for identification, it was submitted that it was not safe because it was at night and light was provided by a torch. The appellant submitted that the possibility of mistaken identification could not be ruled out.

15. The appellant also spent considerable time in elaborate arguments on the number of children who were left with JK on the material night and whether her mother was home or not, which are all matters of fact settled by the two courts below, and which we cannot venture into in a second appeal restricted to issues of law only. In Njoroge v Republic [1982] KLR 388, the Court explained as follows:

> "On a second appeal, the Court of Appeal is only concerned with points of law. On such an appeal the Court is bound by the concurrent finding of facts made by the lower courts unless those findings were not passed on evidence."
>
> (See also Karani v. Republic [2010] 1 KLR 73).

16. The respondent, represented by Ms. Mengo, learned counsel, opposed the appeal vide brief written submissions dated 26th May 2025. It was submitted that the first appellate court had properly re-evaluated and re-analysed the evidence as required in law and reached its own conclusion to the effect that the appellant was properly convicted. In the respondent's view, there were no material contradictions in the prosecution case that would have justified a different conclusion from that reached by the trial court.

17. It was also the respondent's submission that the appellant was properly identified because he was from the neighbourhood, and further that his defence was properly found to be an afterthought.

18. We have carefully considered this second appeal. As correctly submitted by both parties, by dint of section 361 of the Criminal Procedure Code, and the authorities we have cited above, a second appeal is restricted to matters of law only. All issues of fact will have been settled by the two courts below.

19. Starting with the applicant's arguments founded on the alternative count that the appellant faced of indecent act with a child, we do not see how it is relevant to the main charge of defilement. The record shows that the appellant was acquitted of the alternative count but convicted of the main count of defilement. Whether the appellant touched JK's vagina or breasts, as stated in the particulars of the alternative charge, is not relevant to the main charge of defilement, which charged him with penetrating her genitals with his. The argument put forward by the appellant would have been relevant had he been convicted of the alternative count.

20. It is also stretching imagination to credulity to invite the court to conclude that, because JK did not state that the appellant touched her vagina and breasts as stated in the alternative charge, that in itself is evidence that she was not defiled or that the main charge was a fabrication. We are satisfied that there is no basis for making such a conclusion.

21. As regards the appellant's complaint that JK's defilement was not medically proved due to production of the medical report in violation of section 33 of the *Evidence Act*, we note that he raised that same issue in the High Court, which agreed with him that the prosecution had not laid any basis for Dr. Hillary Kangichu to testify on behalf of Dr. Mbaka, who had examined JK. The High Court reasoned that for Dr. Kangichu to testify in lieu of Dr. Mbaka, the prosecution had to first comply with section 33 of the *Evidence Act*, which requires the prosecution to show that the maker of the report is either

dead, cannot be found, has become incapable of giving evidence, or his or her attendance cannot be procured without unreasonable delay or expense.

22. The record shows that the prosecution applied for a witness summons against Dr. Mbaka, and on the resumed hearing of the case, the prosecution did not state that Dr. Mbaka could not attend for any of the reasons set out in section 33 of the *Evidence Act*. Instead, the prosecutor merely said that he was absent, but that there was another person who could testify on his behalf. In those circumstances, the High Court agreed with the appellant that no proper basis had been laid for Dr. Kangichu to testify on behalf of Dr. Mbaka.

23. But even after holding that the medical evidence was not properly produced and discounting it, the High Court found that there was sufficient evidence to prove defilement to the required standard. We quote the reasoning of the High Court in extenso:

> " 30. ..this court having found the production of the medical evidence wanting for the aforesaid reasons, however finds that in sexual offences cases the provisions of Section 124 of *Evidence Act* provides as follows:-
>
> > "...in a criminal case involving a sexual offence, where 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 if, for reasons recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."
> >
> > In this case the trial court found that the offence occurred with close proximity between the victim and the assailant (appellant). The victim knew the perpetrator as she identified him by torch light and she knew him as a neighbour. The identification was found to be "foolproof" as recognition was by voice and appearance. The assailant threatened the minor "Nyamaza nitakuua". The trial court found the minor "candid, consistent and very straight forward." She found her evidence "credible and fool proof." This court has re-evaluated the evidence of the victim and finds that the victim's mother (PW2) corroborated her testimony well. She told the trial court that she returned home at night to find her daughter;
> >
> > > "Lying on her back with her legs wide open...with blood in her vagina and sperms."
> > >
> > > The appellant's own mother testified that when they got back home with the complainant's mother,
> > >
> > > "the complainant told her mother she had been defiled. I confirm the complainant was at home alone. I do not know what happened."
> > >
> > > The above evidence in my view, even after discounting the medical reports whose production was tampered with by the prosecution, this court is satisfied that going by the provisions of Section 124 of the *Evidence Act*, there was still sufficient evidence to return a verdict of

guilt against the appellant simply because the evidence against him was credible and overwhelming."

24. In short, the High Court concluded that even without the medical evidence, there was still sufficient evidence under section 124 of the *Evidence Act* on the basis of which the court could find that JK had been defiled.

25. We agree with the reasoning of the High Court and in addition refer to the holding of this Court in George Kioji v. Republic, Criminal Appeal No. 270 of 2012, as regards proof of defilement:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief." (Emphasis added)

26. On recognition and identification of the appellant, we agree with the appellant that the record of JK's testimony does not say that she recognised the appellant's voice. But that is only one aspect of her recognition of the appellant. She told the court that she knew the appellant before the commission of the offence and that they were neighbours. She was able to recognise him from both the illumination of his cellphone and his torch. She even told the court that the appellant was wearing black pair of jeans.

27. Her evidence of recognition of the appellant was corroborated by JK's mother (PW2), who told the court that they were neighbours with the appellant, and the former chief (DW2) who told the court that JK's home and that of the appellant were about 30 meters apart. Even the appellant's own mother, (DW3) told the court that they were neighbours with JK separated only by a road. In these circumstances where the two courts below made concurrent findings about recognition after taking into account that the appellant and JK were near neighbours and the source of the light from which JK was able to recognise the appellant, including up to the clothes he was wearing at the material time, we have no basis for disturbing those findings.

28. On the assertion that the first appellate court failed in its duty to re-evaluate the evidence, we bear in mind that there is no set formula for re-evaluating and analysing the evidence. In David Njuguna Wairimu v. Republic [2010] eKLR this Court held thus:

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

29. The important thing is that the second appellate court be satisfied that the first appellate court independently considered the material parts of the evidence on the basis of which an appellant was convicted, and having done so, it has either independently agreed or disagreed with the trial court.

Having gone through the judgment carefully, we are satisfied that the learned judge meticulously re-evaluated the relevant evidence and made his own independent conclusion, including disagreeing with the trial court on production of the medical report.

30. The sentence which was meted upon the appellant is a lawful sentence specifically prescribed by statute. We have no basis for interfering with it.

31. In the circumstances, this appeal fails and is hereby dismissed. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER, 2025.

K. M'INOTI

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JUDGE OF APPEAL

A. ALI-ARONI

.....

JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR