



REPUBLIC OF KENYA



KENYA LAW
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**Mutembei v Republic (Criminal Appeal E134 of 2022)
[2026] KEHC 2377 (KLR) (23 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E134 OF 2022
HM NYAGA, J
FEBRUARY 23, 2026**

BETWEEN

ELIJAH MUTEMBEI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon. F.K Munyi – PM delivered on 18-8-2022 in Tigania Principal Magistrates Sexual Offences Act Case No. 47 of 2020)

JUDGMENT

Background:

1. The Appellant was charged with the following counts:
 - a. Principal count: Defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars are that on the 12th day of September 2020, at [Particulars Withheld] in Tigania Central Sub County within Meru County he intentionally caused his penis to penetrate the vagina of S.M a girl aged seventeen (17) years.
 - b. Alternative Count – Committing and indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars are that on the same date and place he intentionally touched the vagina of S.M a girl aged seventeen (17) years with his penis.
2. The case was fully heard and the accused was convicted on the principal count and was sentenced to ten (10) years imprisonment.
3. Aggrieved by the said conviction and sentence, the appellant lodged a petition of appeal dated 29th September 2022.



The Appeal

4. The appellant set out three (3) grounds which are as follows:
 - I. That the trial magistrate erred in law and fact in failing to adhere to section 8(5) of the *Sexual Offences Act* and therefore arrived at a wrong decision.
 - II. That the trial magistrate erred in law and fact in the manner he analysed the evidence on record by failing to take into account relevant facts leading to a wrong decision.
 - III. That conviction was against the weight of the evidence tendered.
5. The appellant sought that the conviction be quashed, sentence set aside, and he be set at liberty.
6. The appeal was canvassed through written submissions which were also highlighted in court.

Appellant's submissions

7. It was submitted that from the evidence adduced, the complainant conceded that she was beaten by her father and the police, locked up in the cells and that is why she gave them the appellant's name. That this is a clear case of coercion by the police influenced by the complainant's father, who was the chief.
8. Counsel submitted that with that kind of evidence, the trial court ought to have cautioned itself before relying on the evidence adduced. Counsel referred me to *Wambui vs Republic (2019) e KLR* to support this submission.
9. Counsel further submitted that the probative value of the complainant's father's evidence and its integrity is worked down given the circumstances under which the information from the complainant was obtained. Cited in support of this submission was *Ndungu Kiremi vs Republic (1979) KLR 282*.
10. Counsel for the appellant further submitted that the complainant who was aged 17 years and 6 months at the material time, had conceded that she had sex with a different man in May 2020. That the complainant had carried herself as person who had attained the age of majority having conceded that she was having sex. Using the term, "we made love" and therefore section 8(5) of Act afforded a good defence for the appellant. On this point, counsel referred the court again to *Wambui vs Republic (supra)*.
11. From the foregoing, counsel for the accused argued the conviction was unsafe.

Respondent's submissions

12. The prosecution counsel submitted that the critical elements of the offence were proven in that firstly, the age of the complainant was established to be 17 years. Secondly, the Clinical Officer who examined the complainant found that she had a freshly torn hymen hyperauthentic vaginal walls and a whitish discharge indicating that she had an infection. Lastly on the identification of the perpetrator it was submitted that the appellant was duly identified by the victim herself.
13. It was further submitted that the defence adduced gave different accounts of the events of the day. That the alibi raised was not sufficient to displace the evidence adduced against the appellant. That the issue of deception about the age was a new defence that was not raised during the trial.
14. On sentence, the prosecution counsel submitted that the same ought to be upheld.
15. The prosecution counsel further submitted that the pre-sentence report revealed that the complainant had suffered an undesirable effect on her mental health which was as a result of victim shaming,



making her feel guilty for having the appellant imprisoned. That this situation was dangerous as it only emboldens the perpetrator of the offence to commit other offences.

Analysis and determination

16. As a first appellate court, the duty imposed upon this court was clearly set out in *Okeno v 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 v Republic* [1987] eKLR, the Court of Appeal stated as follows :

“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. With that in mind then I will look at the evidence adduced in the trial court.

19. The complainant was aged around 17 years at the time of the alleged offence. She told the court how she had met the appellant two weeks earlier. That on the material day they met at Giaki market at around 6:00 pm and chatted until 7:00 pm then parted ways.

20. In her evidence, the complainant further stated that she did not go anywhere with the appellant that day. Then she said that they made love beside the road. When she got home, her parents took her to the police station where she was repeatedly beaten until she revealed what had happened.

21. On cross examination, the complainant conceded that she had previously had sex with another person in the month of May that year.

22. Absalom Wambua (PW2) was the clinician who examined the complainant and the appellant.

23. PW3 was the complainant’s father. He told the court that on the material day when he arrived home, at 7:00 pm he did not find his daughter. He alerted the police about it. When he returned home at midnight, he found the complainant in the kitchen. Since she was lying that she had been home, he took her to the police station and left her there. Later police corporal William (PW5) called him and told him that the complainant had disclosed who was with, the appellant. They then proceeded to the appellant’s home and arrested him.

24. Abel Nkinyua (PW4) was the area manager. He narrated how he met the appellant and three other young men at Ngage market at around 6:00pm on the following day. PW3 called him and they went to the appellant’s home and arrested him.

25. Police corporal William Ngubi (PW5) narrated how he received a report from PW3 that the complainant had gone missing. That they went to the home of one Nyaga Kuria who was reportedly seen with her but did not find her later PW3 called him and informed him that he had found the complainant at home.



26. He asked her to be taken to the police post and upon interrogating her, she disclosed that she had been with the appellant. He then went and had the appellant arrested.
27. PC Nicholas Kakula (PW6) stated that he escorted the complainant to the hospital for examination on 13th September 2020 but the doctor was not present. He then recorded the complainant's statement. Then on 14th September, 2020 he escorted the complainant and the appellant back to the hospital where both were examined. Thereafter he had the appellant arraigned in court.
28. In his defence, the appellant stated that he was a student at Pwani University. He told the court that on the material day, he and his brother did some walk in the morning, then they went to Ngage market where he met other friends. They watched a movie together and then left for the home of Duncan Munene to assist him filling some university application forms. On the way, they met PW3 and PW4 who asked them about the whereabouts of the complainant and they answered in the negative. Later he went home at 3:00 am he was arrested.
29. The appellant conceded that he knew the complainant but denied having met her that day.
30. Julius Mutegi (DW2) was the appellant's father. He stated that the appellant was among the people he was with laying water pipes on the ground. At 1:00 pm his son and Felix Kimathi left for Ngage market. Later the chief (PW3) called him seeking to know the whereabouts of his son. At 3:00pm, the police in company of the chief went to his home and arrested the appellant.
31. Mugao Josephat Kimathi (DW3) told the court that on the material day at around 4:00pm he went to Ngage market. The appellant found him there. They then watched a movie and then went to Duncan's home to help him fill university application forms. On the way, they met PW3, PW4 and PW5 who questioned them about the whereabouts of the complainant. On the following day, he learnt that the appellant had been arrested.
32. Duncan Munene (DW4) told the court that on the material day, he was with DW3 at a barber shop.
33. The appellant and DW3 arrived. They watched a movie until 8:00pm. Thereafter they all went to his home where the others helped him fill out his university forms. As he was escorting them, they met PW3, PW4 and PW5 who interrogated them and the whereabouts of the complainant, then they were released.
34. Having summarised the evidence, the issue that arises is whether the ingredients of the offence of defilement have been proven. These are:
 - a. The age of the victim,
 - b. The act of penetration and
 - c. The identification of the perpetrator
35. In addition, the court has to consider the defence adduced by the appellant.
36. The evidence adduced by the prosecution was to the effect that the complainant was born on 12th June 2003. On the date of the alleged offence, she was 17 years and 3 months old. Thus, she was a child under the law.
37. According to the complainant, on the material day, she met the appellant at around 6:00 pm. In her evidence in chief she stated that they talked and never did anything. However, in the same evidence in chief, she also stated that they made love besides the road. She conceded that she had had sex with another man in May 2020.



38. The clinical officer who examined the complainant made the following findings:
 - a. The hymen was torn
 - b. The vaginal wall was hyperaemic
 - c. A foul-smelling vaginal discharge was noted
39. The appellant was also examined. In the opinion of the clinician, there was evidence of penetration.
40. In my view, there is nothing to suggest that the findings by the clinician were erroneous.
41. On the question of identification of the appellant, I have considered the evidence adduced and the defence raised by the appellant.
42. The complainant admitted that she was beaten and locked up in the cells and for fear of further beatings, she named the appellant as the person she had been with. Her incarceration was confirmed by the own father and corporal William (PW5).
43. In my view, the evidence obtained through coercion poses a great risk. It is possible that the complainant named the appellant for being the person she was with as for the reason that she wanted to avoid further beatings.
44. From the evidence, the complainant's father and corporal William suspected the appellant and his other friends and that's why they were stopped and interrogated that night. They also went to the home of one Kioga, who they suspected that he had been with the complainant that day.
45. The question is, had the complainant mentioned any other person apart from the appellant, would that have led to the said person being charged?
46. I am of the view that the circumstances under which the appellant was named as the suspect raise more questions and answers.
47. Whereas the complainant's father had every right to be worried about where his daughter had been. I think that he went about it the wrong way. Having his daughter locked up was surely the last of his options.
48. The complainant had to find a way to save herself. She may have been telling the truth but there is a possibility that the name of the appellant was given so as to save herself. In *Wambui vs Republic* (supra) the court considered such a scenario and held that such evidence ought to be treated with caution.
49. The appellant's defence was that he never met the complainant on the material day. He called three witnesses who stated that they were with him throughout. Two of them were stopped by the complainant's father and interrogated over her whereabouts. The prosecution counsel labelled their evidence as contradictory but I don't see any contradiction. They all confirm that they were with the appellant at the time the alleged offence was committed, that is between 6:00 pm and 7:00 pm.
50. In fact PW4, the area manager actually confirms the defence as he told the court that he saw the appellant, Duncan (DW4) and his other friends together at Ngage market at around 6:00 pm. It is thus not clear how the appellant could have left the company of his friends at that time then gone to commit the offence.
51. Having considered the matter, I find that the conviction of the appellant was unsafe. There was need for more evidence to link him to the offence. I say so despite the fact that the court can under section



124 of the *Evidence Act*, convict an accused on the sole evidence of the complainant, if for reasons to be recorded, the court is of the view that the complainant is telling the truth.

52. In the instant case, I find that the identification of the appellant was tainted with duress and the complainant may have chosen a scapegoat in order to save herself from further beatings in the hands of her father and the police while being locked up in the cells,
53. As I conclude, I have also noted one issue.
54. The trial court record shows that the appellant was at the beginning of the trial represented by an advocate who cross-examined the complainant. When the case came up for further hearing, nothing on record shows that the trial court made any effort to confirm if the advocate was still representing the appellant or not. The court proceeded as if the appellant was representing himself.
55. Looking at the chain of events, right from the manner that the appellant was arrested, charged and denied bond on the ground of a “trend of interference of witnesses” without actual reference to the appellant’s alleged interference, there is an appearance of a hurried prosecution of the appellant.
56. Failure to enquire of the advocate’s whereabouts meant that the appellant proceeded with the case, which carries a severe sentence on his own.
57. In my view, this was sufficient ground to quash the proceedings before the trial court and declare a mistrial.
58. Going back to the case before me, I find that the evidence against the appellant was unsafe and I am prepared to give him the benefit of the doubt.
59. Therefore, the conviction of the appellant is hereby quashed and the sentence is set aside.
60. The appellant is set at liberty unless lawfully held.

DATED, SIGNED & DELIVERED AT MERU THIS 23RD DAY OF FEBRUARY, 2026.

H. M. NYAGA

JUDGE

