Nzau v Republic (Criminal Appeal E058 of 2022)
[2026] KEHC 4393 (KLR) (19 March 2026) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E058 OF 2022

LW GITARI, J

MARCH 19, 2026

BETWEEN

SAMUEL MATHEKA NZAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appeal arises from the proceedings and Judgment in the Chief Magistrate's Court at Kitui Criminal Case No. E039/2019 where the appellant was charged with Defilement contrary to Section 8(1)(3) of the *Sexual Offences Act*. The particulars of the charge were that on 19/08/2019 at around 1530hours at Mbitini area, Mbitini Location in Kisasi Sub-County within Kitui County intentionally cause his penis to penetrate the vagina of SB a child aged twelve (12) years.

2. The appellant was also charged with an alternative count of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3/2006 in that on 19/8/2019 at around 1530 hours at Mbitini Area, Mbitini Location in Kisasi Sub-County within Kitui County, intentionally touched the vagina of S.B a child aged 12 years with his hands.

3. The appellant denied the charges prompting a full trial to be conducted. In the end the appellant was found guilty on the charge of defilement, was convicted and sentenced to serve nineteen (19) years imprisonment.

4. The appellant was dissatisfied with both the conviction and the sentence and filed this appeal based on the following grounds and on the Petition of Appeal:

    1. That the trial learned magistrate faulted in law and in facts when relied on prosecution evidences which was not proved beyond reasonable doubt.

2. That, the learned magistrate erred in both law and facts when misdirected himself on verdict and unproved documents and relied on without in views that the act was just a frame up one.

3. That, the learned magistrate erred in both law and facts by prosecution evidences which were not collaborated same contributed conviction.

4. That, the learned trial magistrate erred in both law and facts when did not view that the charge sheet and prosecution evidences time of the act was never collaborated.

5. That, the learned magistrate erred in both law and fact while not evaluated that the identification at the scene of crime was not proved beyond standard of law as required.

6. That, the learned trial magistrate erred in both law and facts when convicting appellant with a case never investigated same un proved one.

7. The sentence imposed upon appellant is manifestly excessive.

5. The appellant prays that he conviction be quashed, the sentence be set aside and varied.

The Prosecution's Case

6. PW1 S.B is the complainant. Her testimony was that she is twelve years old and attends,..... Primary School. She is the only child of her mother who she said suffers fits and became unconscious. On 19/8/2019 she was playing with her neighbors who are her play mates. They then left and she was left at the plot. The appellant went there and tied her hands and legs while in his house. The appellant did bad manners to her and left her inside the house which he locked.

7. The appellant felt pain in her vagina. The appellant used a condom. The appellant returned and opened the door. She went back to her mother's house. The mother found her there and asked her why she was crying. She told her it is the appellant. She was taken to hospital.

8. PW 2 No. 107020 PC Mercy Gakii, Police officer attached at Mbitini Police Station Crime Section, testified that on 19/08/2019 she was instructed by the OCS to invest ate a case of defilement. She escorted the complainant to Kitui Hospital where he was examined and a P3 form and PRC form were filed. Her colleagues visited the scene and collected a used condom from the home of the accused.

9. The age of the complainant was assessed at Kitui Hospital and age assessment report showing that the complainant was eleven (11) years old was filled. An underwear was also recovered from the house of the appellant. The condom was produced as exhibit 1 and underwear exhibit 2.

10. PW3 Robinson Katana Musyoka testified that he is the head of Clinical Services at Kitui County and was pursuing masters in Forensic Medicine from Mount Kenya University. He produced a P3 form which was filled by Dr. Thomas Kitika who had retired and had worked with him since the year 2009 and was familiar with his handwriting and signature which he identified on the P3 form. The P3 form was filled in favour of S.B who was twelve years old. The P3 form was from OCS Mbitini. On examination the complainant was normal. The P3 form was filed a day after the incident. There were no lacerations on the genitalia. There hymen was broken. There was no discharge from the vagina. He produced the P3 form and the PRC form as exhibit 5 and appointment card exhibit 6, age assessment exhibit 7.

Defence Case

11. The appellant gave his defence on oath testified that he did not know the child and the child was not is his house. That she lived in the same plot with the complainant but the allegations were malicious.

12. The appeal was canvassed by way of written submissions. I have considered the evidence adduced by the prosecution and the submissions. The issue that arises for determination is whether the charge of defilement against the accused was proved beyond any reasonable doubts.

13. This is a first appeal and this court has a duty to analyze the evidence, evaluate it and come up with its own independent decision. The court has to leave room for the fact that it did not have a chance to see and hear the witnesses when they testified and leave room for that. See Okeno -vs- Republic (1972) EA 32.

14. The appellant in his submission relied on amended grounds of appeal. The first ground he argued is that the learned magistrate failed to find that the key ingredients of the offence of defilement were not proved against him. He further submitted that there were material contradictions and inconsistences which rendered the prosecution witnesses incredible and worthless of believe but also impugned the whole of prosecution case. The appellant agued the two grounds together.

15. On penetration, the appellant submits that it was not proved beyond any reasonable doubts. He relies on Elizabeth Wathiegeni Gatimu (2015) eKLR. He submits that the complainant did not scream. That the complainant said he used a condom and the PRC form sates that no condom was used. That the complainant was not reliable.

16. The respondent submitted that the ingredient of penetration was clearly established from the oral testimony of the complainant. That the testimony was corroborated by the medical evidence that was adduced by Pw3 who confirmed that the hymen was broken. That the condom that was produced as exhibit 2 was proof of the veracity of the testimony of PW1.

17. I have considered the submissions. Penetration is one of the key ingredients of the charge of defilement that should be proved beyond any reasonable doubts. It is proved by the testimony of the complainant and corroborated by the medical evidence as well as other material supportive evidence.

18. The issue for determination is whether penetration was proved. Penetration is defied under Section 2 of the *Sexual Offences Act* as follows:

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

Thus, penetration need not be complete insertion of the genital organ of a person into the genital organs of another person. Partial or the contact of the genital organ with that of another constitutes penetration. Neither does penetration has to be deep inside the genital organ.

19. In the case of Mark Oiruri Mose -vs- Republic (2013) eKLR the court held that:

> "In any event, the offence is against penetration of a minor and penetration does not end necessarily in release of sperms into the victim. Many times, the attacker does not fully complete 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 service the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ."

20. In Benjamin Lihuru Matwi -vs- Republic (2015) eKLR it was held that:

> " It is significant to point out that penetration need not be complete for it to constitute the offence of defilement. According to Section 2 of the Act partial penetration would also suffice to establish the offence of defilement."

21. The appellant has urged that there was no penetration as the doctor did not notice any scars, bruise and though the doctor formed the opinion that there was penetration, it has been several ruled that broken hymen is not proof of penetration. The appellant relied on the Court of Appeal decision in John Mutua Mulundi -vs- Republic (2017) eKLR which Arthu Mislila Manga -vs- (2017) eKLR where it was held:

> " But did the medical evidence on record establish that JM was defiled"

22. We do not think so. It is appropriate to produce verbertim of the findings of Jentiza after examining JM, as narrated before the trial court by PW3. "No bloodstain was seen on the clothes. On the head, abdomen and thorax nothing was seen. On genitalia the hymen was absent and the vagina was open. No discharge was seen No. injuries on the legs or hands. Pregnancy and HIV tests were negative. The urine was negative. HIV test was to be done in three months"

> " From both the evidence of PW3 as well as P3 form which we have carefully perused other than noting absence of hymen and consequently and open vagina, Jentiza were expressed any opinion that J.M had been defiled or defiled the previous day.
>
> There was nothing on record to suggest that J.M had lost her hymen the d ay before Jeuliza examined. The medical evidence having failed to confirm that J.N was defiled the only other evidence of defilement was that of J.M. it was trite that under the proviso to Section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of the sexual offence alone.
>
> However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

23. The court of Appeal went on to state that:

> " Much as the trial court believed the testimony of the complainant there was no strict compliance with the requirements of the proviso to Section 124 of the *Evidence Act* afore said. It is quite clear that there was doubt as to whether the complainant was actually defiled by the appellant since there was no credible evidence as to the penetration of the complainant, it is trite that those doubts should have been resoled in favour of the appellant."

24. In this case, the complainant the appellant tied her hands and legs in his house, then did bad manners to me then left me in the house and locked it. I felt pain in the body where I use to urinate. He used a condom. I remained inside the house crying when he locked it. He came back opened the door and let me leave. It was on 19/8/2019.

25. PW2 escorted the complainant to hospital on 19/8/2019. The incident occurred a day prior. On examination of genitalia there were no laceration seen but the hymen was broken. There was no discharge from the vagina. Test were conducted, urinalysis obtained nothing. HIV test was negative.

Pregnancy was negative. No spermatozoa were seen. PW3 also produced the Post Rape Care (PRC) form which had similar observations as that on P3 form.

26. From the foregoing analysis, the only positive finding was the broken hymen. The testimony of the complainant was not corroborated though the learned magistrate found that used condom was recovered, this testimony was uncorroborated and hearsay because PW2 stated:

> " My colleagues went to the scene and were able to collect condom used by the accused in his home. They collected underwear used condom in the accused house..."

27. The prosecution never called the witness who recovered the condom and the underwear, he was not called as a witness. Furthermore, PW2's testimony is that the accused was not in the house when the items were recovered. PW1's testimony is not admissible with regard to recovery of the condom and the underwear as the person who recovered the items was not called as a witness.

28. The end result is that the testimony of PW1 was not corroborated. The learned trial magistrate had a duty to state why he had to rely on the uncorroborated testimony of PW1. Section 124 of the *Evidence Act* (Cap 80 Laws of Kenya) provides as follows:

> " 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."

29. The court of Appeal in the case of Munyuoki (supra) stated that:

> " The learned magistrate was required to be satisfied first that the victim is telling the truth and thereafter record the reason for such belief."

30. In this case the learned trial magistrate did not comply with Section 124 of the *Evidence Act* (Supra). The evidence of PW1 was not corroborated and therefore the benefit of doubt ought to have been given to the appellant. The broken hymen could not have been freshly broken considering that the genitalia was normal with no tears, no lacerations and no discharge.

31. The appellant alluded to the fact that the complainant had previously lodge a complaint of defilement by her father. This cast doubt as to whether the hymen was freshly broken or previously torn. There was a disconnect as to how the report was made to the police. PW1 said she reported to her mother and she was taken to hospital. No statement was recorded from the mother and she was not called as a witness.

32. I find that failure by the learned magistrate to indicate whether he believed the complainant left a gap in the prosecution's case. The learned magistrate failed to interrogate the defence of the appellant and especially because he gave a plausible defence of alibi which was not disapproved. PW2 testified that the appellant was not at the scene when the un-named policemen went to his house and recovered the underwear and used condom. The defence was plausible.

33. I have considered all the submissions. I find that the evidence adduced against the appellant was insufficient and could not establish the charge of defilement against the appellant beyond any reasonable doubts. As held by the court of Appeal in the Case of Jetiu Mutua Munyoki -vs- Republic (Supra) where the charge is not proved beyond any reasonable doubts, the benefits of doubts must be given to the appellant.

34. I find that the Appeal has merits and I allow it. I quash the conviction and set aside the sentence. The appellant is set at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 19TH DAY OF MARCH, 2026.

HON. LADY JUSTICE L. GITARI

JUDGE