Muthoni v Republic (Criminal Appeal E051 of 2022)
[2026] KEHC 6373 (KLR) (5 May 2026) (Judgment)

Neutral citation: [2026] KEHC 6373 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E051 OF 2022

DKN MAGARE, J

MAY 5, 2026

BETWEEN

FESTUS NDUNGU MUTHONI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. F. Mugungo Senior Resident Magistrate in Nyeri CMCSO No. E034 of 2019 delivered on 17.3.2022.

2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence in the main charge weas that on the diverse dates between 16.8.2019 and 19.9.2019 at Endarasha Sub-Location, Kieni West Sub-County within Nyeri County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of RWG, a child aged 15 years. On the alternative charge, he was charged with committing an indecent act by touching breasts, buttocks and vagina using his hands and penis.

3. The Appellant was arraigned and he denied the charges. A plea of not guilty was consequently recorded.

4. The Trial Court considered the case and rendered the Judgement on 17.3.2022. The Court found the Appellant guilty and convicted him of the offence of defilement. The Appellant was also sentenced to 20 years imprisonment.

5. The Appellant, aggrieved, lodged this Appeal vide the Petition of Appeal filed on 21.11.2022. He raised these material grounds:

    a. The sentence imposed was harsh and excessive.

    b. Time spent in custody was not considered as required under section 333 (2) of the penal code.

c. The court erred on not considering the ages of the Appellant and the minor.

d. The court erred in failing to consider that medical evidence was not done according to required standards.

e. The court erred in not considering the contradictions and inconsistencies in prosecution evidence.

Evidence

6. At trial, PW1 was Onesimus Mumbi. He was a pastor at Kimere PEFA Church. On 18.8.2019, he was in church meeting youth members. The minor's mother came inquiring where the minor was. The minor's grandmother asked him to look for Felistus who made KDF Cakes. It was at night. In the morning of 18.9.2019, they found a youth member, one Ndegwa who knew Festus. They passed by Endarasha Police Station and were given 2 police officers. They went where Festus rented. Festus was the Appellant. a neighbor told them the Appellant had just left his house with a young lady. They went to the shopping Centre where the Appellant cooked cakes. They found the Appellant and the minor. The Appellant was arrested. There Appellant applied for recall of PW1 for cross examination. On 9.3.2021, on cross examination, PW1 testified that youth related to ages 13 to 17 and PW2 was a youth.PW2 had attended a youth meeting at Karatina. This had been organized by the PEFA Church. They found PW2 with the Appellant.

7. PW2 was the minor. she was 15 years. She was in standard 8 Runyugwathi primary school. on 13.8.2019, she left home for Nyeri to attend youth conference at Karatina. The conference ended 16.8.2019. she went with the Appellant to his home. His home was at Endarasha. She met the Appellant at Nyeri town. This was the first time she met him. the Appellant's house was two roomed. She stayed with him up to 19.8.2019. At night, they would have sex on 18th and 19th. She consented to sex. on 19.8.20219 when they had gone t have breakfast where the Appellant cooked KDF Mandazi's she was arrested with the Appellant. On cross examination, she stated that she was in standard 8 and she informed the Appellant as such. She did not inform him that she was learning driving.

8. PW3 was Mary Wanjiru Ndirangu. She was PW2's mother. PW2 was born on 8.8.2004 and was 15 years. On 13.8.2019, the church commissioned youths to attend a conference in Karatina. They were to return home on 16.8.2019 but PW2 did not come home. She sent Faith to chaech at church on what happened. Youth mummers said PW2 was seen with a young man in Nyeri. On 19.8.2019, the pastor called saying he had found PW2 with a man. PW2 said that she had sex with the young man for the 3 days. They went to hospital and p3 form was filled on 26.8.2019 and PRC form dated 19.8.2019.

9. PW3 was recalled on the request of the Appellant. On 25.2.2021 she continued her testimony that PW2 was then 17 years. On cross examination, it was her case that PW2 was found with the Appellant. She produced the birth certificate.

10. PW4 was No. 110933 PC John Chai attached to Endarasha Police Station. He was the Investigating Officer. He took up investigations on 19.8.2019. It was his case that following investigations, he reasonably believed that the Appellant was culpable and he arrested the Appellant to face the charges before court. He relied PRC Form, P3 Form.

11. PW5 was Fredrick Wanjohi. He was the clinical officer of Mweiga Health centre. He was working at Endarasha Health centre in 2019. He examined PW2 on 19.8.2019. There were no wounds on the genitalia. There was whitish discharge. Hymen was broken. There was no bleeding. On cross examination, he did not find any spermatozoa. White discharge suggested infection of discharge from a man. He could not tell whether hymen was old or freshly broken.

12. The Appellant also testified on oath as DW1. He testified that on 18.8.2019, he went to Njeri, his aunt. His grandmother gave him Ksh. 1,500/= to buy fertilizer on way back. On 19.8.2019, he went to buy fertilizer, 10 kgs. He went into hotel and ordered for tea. A young girl came, sat next to him and ordered for her tea. Around 11 am, two police officers and one officer that they were looking for the Appellant. They then arrested him.

13. DW2 was Marata Ngima. The Appellant was his grandson. On 18.8.2019, she sent Appellant to shopping centre to buy fertilizer. The Appellant did not come back. Even the following morning he did not bring the fertilizer. Later, she was told that the Appellant was at a police station.

14. DW3 was Teresa Njeri. Appellant was her son. On 18.8.2019, the Appellant was home. He said DW2 had sent him to buy fertilizer. The following day, he went to Endarasha. She heard that the Appellant had been arrested. on cross examination, the Appellant came home on 18.8.2019 at 1400hrs. he spent a night at home.

15. DW4 was Starnley Kimumu Maina. He was brother of the Appellant. on 18.8.2019, the Appellant was sent to buy fertilizer. On 19.8.2019, he heard that the Appellant had been arrested. On cross examination, he was not present when the Appellant was sent to buy fertilizer. He could not attest to what the Appellant did.

16. The Appellant filed submissions dated 16.3.2026. It was submitted that both the PRC and the P3 Forms that the prosecution used as exhibits were not authentic at all. The PRC Form is usually relied on to fill in the P3 Form.

17. It was also submitted that he PRC Form went missing and thus what was in the P3 Form cannot be authentic in any way whatsoever. What was taken to be the doctor's evidence in court based on the P3 Form cannot be used by this court as evidence to convict the appellant.

18. It was submitted that the *Sexual Offences Act* No.3 of 2006, Section 8 (5), it is a defence to a charge of defilement if it can be proved that the child, deceived the accused into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and the accused reasonably believed that the child was over the age of eighteen years.

19. It was also submitted that there were contradictions and inconsistencies that this court should take notice of are that of PW4, the investigating officer, PW5 the doctor at PGH Nyeri and PW6 the clinical officer at Endarasha Health Center.

20. The Respondent filed submissions dated 17.2.2026. It was submitted that the sentence of 20 years was the mandatory minimum. Reliance was placed on SC Pet No. 18 of 2023- Republic v Joshua Gichuki Mwangi & 4 Others (2024)e KLR.

21. It was submitted that the medical evidence was clear and implicated the Appellant.

22. It was submitted that the prosecution evidence was not marred with contradictions and discrepancies. Reliance was placed on the case of Watu v Republic [2016] with regards to contradictions and inconsistencies in witness statements as follows: "It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt."

Analysis

23. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

24. Therefore, this Court will not interfere with the exercise of judicial discretion by the court below unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another v Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

25. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. I note this to be in error as PW1 was said to be 11 years old. I reproduce Section 8 (1)-(4) of the *Sexual Offences Act* as follows:

> **Defilement**
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
>
> (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.
>
> (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

26. It is trite that this court dealing with the instant appeal is entitled to consider the evidence in the trial court as a whole as being submitted a fresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated as follows:-

1. 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

27. The issue for this court's determination is whether the prosecution proved the offence of defilement as against the Appellant beyond reasonable doubt.

28. Proof beyond reasonable doubt does not impose a standard of proof beyond the shadow of a doubt. Where the evidence tendered is so strong as to leave only a remote possibility in favour of the accused person, which can be dismissed with the sentence "of course it is possible, but not in the least probable", then it can be said in law that the case is proved beyond reasonable doubt. It was held by the Court of Appeal in Moses Nato Raphael v Republic [2015] eKLR as doth:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

29. The parameters that were to be proved in cases such like the instant case were settled in the case of George Opondo Olunga v Republic [2016] eKLR that the ingredients of the offence of defilement are proof of complainant's age, proof of penetration and proof of the identification of the perpetrator.

30. At trial, PW1 testified that the Appellant took her to his house on 16.8.2016 and they had sex on two nights. The Appellant was placed in status quo. PW1 did not return home when the youth conference ended on 16.8.2016. The court placed weight on the evidence of PW1, PW3 and PW4 as corroborating the evidence of PW2. In Abel Monari Nyanamba & 4 others v Republic [1996] KECA 196 (KLR), the Court of Appeal stated thus:

The evidence of a hostile witness is indeed evidence in the case although generally of little value. Obviously, no court could found a conviction solely on the evidence of a hostile witness because his unreliability must itself introduce an element of reasonable doubt.

The inevitable conclusion after PW4 had been declared a hostile witness was that he became an unreliable witness, whose evidence would be rejected as untrustworthy. He was discredited completely. In our view, PW4 was substantially an unreliable witness and all parts of his evidence should have been rejected. It must follow, therefore, that nothing PW4 said in Court could be accepted against any of the appellants.

31. However, PW3 confirmed that the minor was not home. PW1 was the church pastor. Indeed, PW2 attended the conference in Karatina. PW1 accompanied the police that together, they found the

Appellant with PW2 at the restaurant. This evidence was not shaken. The alibi set up by the Appellant did not dispel any doubt. DW2,DW3 and DW4 all did not demonstrated where the Appellant was on 16 and 17th August 2019. They were clear that the Appellant was home. They however dis not rule out that the Appellant was with PW2.

32. Therefore, on the issue of identification, in my close reevaluation, identification was well proved to the required standard. To this court, the Respondent's duty was not just to prove that the minor knew the Appellant. There more. The Respondent needed to prove commission of the offence by the Appellant. This was done.

33. The scene of crime was proved to be the house of the Appellant. The evidence of PW1 was not shaken.

34. On penetration, on the reevaluation of evidence, the plausible evidence of PW2 was corroborated by the medical evidence and evidence of PW1 and PW3. There was no manner the evidence of the medical doctor was unauthentic as submitted the Appellant. I find no prejudice in the circumstances of this case. for. This was not a case of a single identifying witness where the circumstances surrounding the commission of the offence could only be determined by circumstantial evidence.

35. On the aspect of age, age is such a crucial component in sexual offences that it points to the extent of punishment for the offenders. This was also the position of the court in Kaingu Kasomo v Republic, Criminal Appeal No. 504 of 2010 (UR), where the Court of Appeal stated doth:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

36. The age of the minor herein could be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. In Mwalengo Chichoro Mwajembe v Republic, Msa. App. No. 24 of 2015 (UR) the court held:

"..... the question of proof of age has finally been settled by decisions of this court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof....

37. Medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim. In Francis Omuroni v Uganda, CR. A 2/200 it was held:

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by a birth certificate, the victim's parents or guardian and by observation and common sense. ...."

38. Consequently, age herein was proved by the production of the Birth Certificate dated 6.8.2004. The minor was 15 years at the time of the alleged offence. I find not manner in which age was not proved.

The birth certificate was issued on 27.11.2007 and I have reason to doubt it. The Court of Appeal in the case of Edwin Nyambogo Onsongo v Republic (2016 eKLR stated as follows on the proof of age:

> " ... the question of proof of age has finally been settled by recent decision of this court to the effect that it can be proved by documents, evidence such as birth certificate, baptism, card or by oral evidence of the parents or the guardian or medical evidence among other credible form of proof. We think that what ought to be stressed is that whatever the nature of the evidence preferred in proof of the victims age it has to be credible and reliable.

39. I find no basis to interfere with the discretion of the trial court in finding the age to be 15 years. The court did exercise its discretion in accordance with the law. In the case of Ramakant Rai v Madan Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> " Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
>
> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

40. I dismiss the allegation of inconsistencies. The prosecution case was seamless and consistent. I do not find any inconsistencies or contradictions that go to the root of the offence as alleged in the Record of Appeal. The Respondent tendered overwhelming evidence that implicated the Appellant and the trial court correctly returned the verdict of guilty on the alternative charge. Courts have held that minor contradictions in the glare of overwhelming evidence to establish the guilt of the Accused person cannot go to the root of disproving guilt. In Dickson Elia Nsamba Shapwata & another v. The Republic, cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

> " In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

41. The attempt to submit that PW2 consented to the sexual intercourse was out of place regarding the incapacity of the minor to consent. The submission that the Appellant was mislead to believe that the minor was an adult failed the test under Section 8(5) of the *Sexual Offences Act*. It was upon the Appellant to describe what could have led him into believing the minor to be an adult based on the said law as follows:

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.

42. The Appellant appears to appeal that the sentence was too harsh and failed to consider time spent in custody. I note that under Section 8(3) of the *sexual offences Act*, the term of imprisonment was 20 years for defilement of a child aged 15 years. The trial court sentenced the Appellant to serve 20 years imprisonment and this being the mandatory statutory minimum, I find no basis to interferer.

43. The court stated that time spent in custody be considered and cited the term of 20 years to commence from 21.8.2019. This was the date of arrest. The Appellant was not correct in appealing that time spent in custody was not considered.

44. I am unable to find reason to set aside the conviction. I dismiss the Appeal.

Determination

45. I make the following final Orders:

i. This Appeal is devoid of merit and is dismissed.

ii. 14 days right of appeal explained.

iii. file is closed

DELIVERED, DATED AND SIGNED AT NYERI, VIRTUALLY ON THIS 5TH DAY OF MAY 2026.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant Present

Mr. Sirma for the Appellant

Mr. Kihara for the Respondent

Court Assistant - Michael

M.D.KIZITO,J.