



**Mutai v Republic (Criminal Appeal 72 of 2018)
[2025] KECA 940 (KLR) (23 May 2025) (Reasons)**

Neutral citation: [2025] KECA 940 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 72 OF 2018
MA WARSAME, JM MATIVO & PM GACHOKA, JJA
MAY 23, 2025**

BETWEEN

IBRAHIM KIPNGETICH MUTAI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Bomet
(M. Muya, J.) dated 2nd October 2018 in CRA (S.O) No. 3 of 2018)*

REASONS

1. The appellant was convicted of the offence of defilement contrary to section 8 (1) & (3) of the [Sexual Offences Act](#) on 22nd November 2017 in Sotik Principal Magistrate’s Court Criminal Case No. 10 B of 2017 and sentenced to 20 years imprisonment. His appeal to the High Court at Bomet being High Court Criminal Case No. 3 of 2018 was unsuccessful. In his quest for justice, he lodged the instant appeal.
2. When the appeal came before us for hearing on 25th February 2025, the appellant appeared in person while Mr. Omutelema representing the State did not oppose the appeal. After hearing both parties, we ordered as follows:

“The Court having considered the submissions by the appellant, and submissions by Mr. Omutelema for the director of public prosecution, who has now conceded to the appeal, pursuant to rule 34 of the Court of Appeal rules, we hereby allow the appeal and order that the appellant be released from custody immediately, unless lawfully held. We will give the reasons for our judgment on 23rd May 2025.”
3. As the record shows, the hearing before the trial court began on 28th August 2017 when the complainant commenced giving her evidence. However, shortly after she commenced her testimony,



the prosecutor, after noting that her testimony differed materially from her statement to the police applied to the court for her to be stepped down. Hearing resumed on 27th September 2017, and again the complainant was stepped down at the prosecutor's request. The court proceeded to hear evidence from the complainant's mother and one more witness. The complainant's mother was categorical in her evidence that the complainant did not sleep on the same bed with the appellant.

4. When the complainant took the witness stand again, after listening to her evidence, which varied from her witness statement, the prosecutor applied for her to be declared hostile, and the trial court declared her as such and she was cross-examined by the prosecutor. She maintained that the appellant was her mother's friend. The prosecution also called the Clinical Officer whose evidence support of the prosecution was that there was evidence of penetration.
5. In criminal trials, retracted evidence from a key witness is considered with a high degree of caution and its value is determined by several factors. Courts generally take a skeptical view of the credibility of a witness who recants his or her previous statement, considering it a sign of unreliability. The value of retracted evidence depends on whether it's corroborated by other evidence or the court can conclude the evidence is inherently true based on its character and the circumstances. (See *Ogero Omurwa v Republic* [1979] eKLR).

6. If a witness becomes hostile or refuses to testify, the court may consider their previous statement, but its value will be assessed considering the witness's changed stance or reluctance. This

Court of Appeal in the case of *Daniel Odhiambo Koyo v Republic* [2011] eKLR had this to say on the probative value of evidence of a refractory and hostile witness;

“...The law on such witnesses is clear. The probative value of his evidence is negligible. It may be relied upon in clear cases to support the prosecution or defence case. In *Maghenda v Republic* [1986] KLR 255 at P. 257, this Court remarked thus regarding the evidence of a hostile witness:

“The evidence of a hostile witness must be evaluated, in particular if it tends to favour the accused though it may not necessarily be acted upon by the Court.”

7. Normally a court will take a perverse view of the credibility of the hostile or refractory witness in view of his shift in position regarding his statement to the police regarding the case against the accused or his reluctance to testify. As was held by this Court in *Abel Monari Nyanamba & 4 Others v Republic* [1996] eKLR a hostile witness is one who from the manner in which he gives evidence shows that he is not desirous of telling the truth to the court. (See *Coles v Coles*, [1866] L.R. 1P. &D. 70, 71, Sir J.P. Wilde). The basis of leave to treat a witness as hostile is that the conflict between the evidence which the witness is giving and some earlier statement shows him or her to be unreliable, and this makes his or her evidence negligible. (See *Alowo v Republic* [1972] EA at page 324).
8. However, if retracted evidence is corroborated by other evidence or the court can independently conclude its truth based on the circumstances, it may still be considered relevant. In this case, the only evidence that remains is the testimony tendered by the clinical officer. Section 124 of the *Evidence Act* provides:

“Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim 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.”

9. The complainant’s evidence, is in our view unreliable. It was the evidence of the weakest kind and it could not be cured by the evidence tendered by the Clinical Officer. It follows that the conviction premised on the said evidence was totally unsafe. In our view, Mr. Omutelema rightly conceded this appeal. Therefore, it is for the foregoing reasons that on 25th February 2025 we ordered that the appellant be released from prison forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF MAY, 2025.

M. WARSAME

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

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M. GACHOKA C.Arb, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.

