



**Mutunga v Republic (Criminal Appeal E028 of 2022)  
[2025] KECA 729 (KLR) (2 May 2025) (Judgment)**

Neutral citation: [2025] KECA 729 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL E028 OF 2022  
J MOHAMMED, F TUIYOTT & P NYAMWEYA, JJA  
MAY 2, 2025**

**BETWEEN**

**FRANCIS MWANZIA MUTUNGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the judgement of the High Court of Kenya at Makueni  
(G. Dulu, J.) delivered on 19th October 2022 in H.C.Cr.A. No. E112 of 2021)*

**JUDGMENT**

1. Francis Mwanzia Mutunga (the appellant) should never have been convicted for the charge of attempted defilement of PMK alleged to have occurred on 7<sup>th</sup> December 2020 at around 13.00pm at Kilome sub location in Mukaa Sub County within Makueni County. The offence was said to be that he unlawfully and intentionally attempted to commit an act which would cause penetration of his genital organ to the genital organ of PMK aged 15 years.
2. The complainant was born on 15<sup>th</sup> May 2004 and would be 15 years and about 6 months on the date of the alleged incident. Abridged, her testimony before the trial court was that, feigning to be a police officer, the appellant accosted her and asked her why she was not wearing a face mask. She attempted to get away from him but he held her by her clothes, she struggled to let go and screamed. He did not relent, the struggle lasted for about half an hour. Exhausted and 'weak' after the lengthy scuffle, she fell to the ground. He lifted her skirt and removed her inner wear but luckily, some people who were burning charcoal nearby came to her rescue. They arrested the appellant and both the victim and the assailant were taken to a police station at 2.30pm. The complainant was later taken to hospital.
3. Central to the testimony of the complainant was that she sustained injuries during the struggle. Injuries were on the back of her leg being scratches caused by stones and injuries on her neck due



to strangulation. So pivotal was the supposed physical assault that the State preferred a second count against the appellant of assault causing actual bodily harm contrary to section 251 of the *Penal Code*.

4. Samson Mulinge (PW2), an engineer in Nairobi was on that day at about noon to 1.00pm removing charcoal from a forest when he heard noise from the road. He and one Daniel Kole, rushed to the direction of the noise. There, he found PMK fighting with the appellant. He intervened and held the appellant. Later the police came to scene and arrested the appellant. P.C. Samuel Irungu (PW3) received the appellant at Kilome Police Station on the same day at about 15.00 hours. He re-arrested him.

5. It was the testimony of PW3 that:

“The girl was complaining of injuries on her neck because she was strangled by accused.”

6. The only other witness was Erick Kasiamani (PW4). At the time of giving evidence, he was a clinical officer at Kilungu sub county hospital. He filed a P3 form for the complainant based on histology from the same hospital. His evidence, in part, was:

“On examination, there were no injuries noted on the body. On the genitalia the hymen was intact.”

7. In defence, the appellant denied the charges. It is needless to rehash his testimony. All we need to say is that he did not in any way implicate himself.

8. Both the trial court and the High Court believed the account put forward by the prosecution, and this Court as a second appellate court ought to ordinarily give deference to concurrent findings of the two courts below. On this occasion we must, respectfully, disagree that the evidence before the trial court could lead to a finding that was safe and sound.

9. So intertwined is the complaint that the appellant attempted to rape the victim but also assaulted her. That both happened was the theory put forward by the prosecution who found it necessary to charge the appellant not only with attempted defilement but “assault causing actual bodily harm”. Yet the medical evidence was emphatic that no injuries were suffered by the complainant at all. Debunking the evidence of the victim that she suffered injuries to the back of her leg occasioned by scratches from stones and a neck injury due to strangulation.

10. If one takes this alongside the fact that one of the supposed first responders, Daniel Kole did not testify without explanation why he would not, then there is a doubt created about the truthfulness of the victim’s evidence, the only direct evidence. This is a doubt which, as commanded time and again by criminal law, must be resolved in favour of the appellant. See for example Philip Nzaka Watu v Republic [2016] eKLR.

11. Indeed Mr. Jami Yamina, learned Acting Assistant Director of Public Prosecution, was gracious enough to concede that the evidence could not support a conviction.

12. Ultimately, we allow the appeal. The conviction of the appellant entered on November 17, 2021 in Principal Magistrates’ Court Kilungu Sexual Offence No. 62 of 2020 Republic vs Francis Mwanzia Mutunga and upheld by the High Court is hereby quashed and sentence set aside. The appellant shall be released forthwith unless held for some other lawful reason.

**DATED AND DELIVERED AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF MAY 2025.**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

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

Signed

Deputy Registrar.

