Muthike v Republic (Criminal Appeal 136 of 2019)
[2025] KECA 1148 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1148 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 136 OF 2019

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

JUNE 20, 2025

BETWEEN

DANIEL MURIITHI MUTHIKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kerugoya (L. Gitari, J.) delivered on 27th June 2019 in HCCRA No. 5 of 2017)

JUDGMENT

1. This is a second appeal against the appellant's conviction and sentence for the offence of defilement of a child, contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. It would be apt to set out a brief background of the case as was presented before the trial court.

2. The appellant, Daniel Muriithi Muthike was charged before the Baricho Law Court in Kirinyaga County, with the offence of defilement of a child contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* ("The Act"). The particulars of the offence were that, on 1st May 2016 at [particulars withheld] village in Mwea West Sub-County within Kirinyaga County, he intentionally and unlawfully caused his penis to penetrate the vagina of ANM (PW2), a child aged 14 years.

3. PW1, Nahashon Muremi, a Clinical Officer at Sagana Sub-County Hospital, in his testimony, informed the court that on 2nd May 2016, the Officer in Charge of Sagana Police Station sent PW2 to the hospital for a medical examination. PW2 told him that she had been defiled the previous day by a person known to her. At the time of the examination, PW2 had already taken a bath and changed clothes. She informed him that the perpetrator dragged her into his house, tied her mouth with a piece of cloth, caressed her, removed her clothes and inserted his penis into her vagina. On examination he found PW2 was in fair general condition but her thighs were in pain. On examining her genitalia, he found her labia majora and labia minora to be normal; she had blood discharge on the vaginal opening;

the hymen was freshly broken; she had red blood cells and pus cells upon a high vaginal swab being done; no spermatozoa were seen. The approximate time of the injuries was one day; the probable type of weapon used was blunt. He classified the injuries as harm. He formed the opinion that PW2 had been defiled. PW2 was treated with post-exposure prophylaxis to prevent HIV, emergency pills to prevent pregnancy, antibiotics, antifungals and analgesics. He filled out the P3 form.

4. PW2, ANM, testified that on 1st May 2016 at about 6:30 pm, while she was on her way to her aunt's home in Ngothi village, the appellant, who was known to her, called her to his butchery within Ngothi Shopping Centre. PW2 heeded the call and got into the butchery, when the appellant then held her, covered her mouth with a piece of cloth and took her to his house, which was a single room behind the butchery. He took off PW2's clothes, lay her on his bed, removed his clothes, inserted his penis into PW2's vagina and defiled her, causing her to bleed in her private parts. Immediately after she left the appellant's place, she reported the incident to her grandmother (PW3), who sent her to report the matter to her father, which she did. Her father escorted her to Sagana Police Station, where she reported the matter.

5. PW3, ANG, PW2's grandmother, testified that on 1st May 2016 at about 8:00 pm, while at home, PW2 went to her crying and informed her that she had been defiled by 'Denny' (the appellant), who sold meat at "Wa Shiru's Butchery". She took PW2 to her father, EM, who interrogated PW2 in her presence. She advised EM to take PW2 to the hospital. The witness was later called at the Sagana Police Station, where she recorded a statement.

6. PW4, Cpl. Hillary Ruto of Sagana Police Station, the investigating officer, testified that on 2nd May 2016 at 12:15 a.m., PW2 and her father reported that the appellant, Daniel Muriithi Muthike, also known as Dennis, had defiled PW2. He booked the report in the Occurrence Book, and along with P.C. Achieng, they escorted PW2 to Sagana Sub-County Hospital for examination. After the examination, PW4 recorded witness statements.

7. He further testified that PW2 informed him that on 1st May 2016, as she was passing near Plainsview Butchery within Ngothi village around 7.00 p.m., the appellant, who sold meat at the said butchery, called her and told her that he wanted to have sex with her. She refused, but the appellant lifted her and carried her to his house behind the butchery, placed her on the bed, undressed her, covered her mouth with a handkerchief, and defiled her several times. He released her at about 8.30 p.m. and instructed her to go home. When PW2 got home, she found her grandmother, PW3, and narrated the incident. PW3 then informed PW2's father on his arrival about 10 minutes later. The father subsequently took PW2 to the police station. He had obtained PW2's birth certificate, which indicated she was born on 2nd January 2002, making her 14 years old at the time of the offence.

8. At the close of the prosecution's case, the court found the appellant had a case to answer, and when put to his defence, he gave an unsworn statement and called one witness. It was his testimony that on the day of his arrest he had spent his day selling meat at his butchery until 5:00 p.m. Thereafter, he went to a nightclub in Ngothi village, and at around 7:00 p.m., village elders approached him in the club and informed him that hehad been accused of defiling PW2 on 1st May 2016. They then took him to Rukanga Police S tation. He called PW2's father, who demanded Kshs. 70,000 from him to drop the case. He told PW2's father that he did not have the money. Subsequently, a police vehicle arrived and took him to Sagana Police Station. On 3rd May 2016, he was taken to court and charged.

9. DW2, David Maina Gichangi, testified that on 1st May 2016, he spent the entire day with the appellant, as the appellant sold meat while he sold beer at Plainsview Bar in Ngothi village. He denied that a defilement incident involving the appellant occurred. He further testified that they parted ways with the appellant at night and each went to their respective homes, meeting again at work the following

day. While at work at around 8.00 p.m., some villagers from Ngothi approached him and informed him that they had been instructed to take the appellant to the police. He advised the appellant to lock up the butchery. The appellant was then taken to the police station and later to court.

10. In its determination, the trial court found that the ingredients of the offence of defilement had been established, convicted the appellant as charged and sentenced him to 20 years' imprisonment.

11. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. In the judgment dated 27th June 2019, the learned judge upheld both the conviction and sentence, thus precipitating this second appeal.

12. In an undated homegrown grounds of appeal, the appellant faulted the judge on the grounds that she erred in law and facts: by failing to consider that penetration was not satisfactorily proved; a DNA test was not carried out to establish whether or not the appellant had participated in the alleged act; a crucial witness, the complainant's father was not availed; the identity of the perpetrator was not proved beyond reasonable doubt and the appellant's defence and mitigation were overlooked.

13. In his written submissions, the appellant submitted that the prosecution failed to prove the ingredients of the offence of defilement, which the two courts below failed to consider. On penetration, he contended that the medical evidence was inconclusive. Further, PW1 based his conclusion that defilement occurred based on information gathered from PW1. In the appellant's opinion, while the hymen was said to have been broken, the cause was not established. Regarding the blood discharge noted at the vaginal opening, the appellant contended that it could have resulted from menstruation. Additionally, the appellant claimed that he was not examined.

14. The appellant further argued that the prosecution failed to identify the perpetrator of the offence. That the court placed undue reliance on the testimony of PW2, whom he claims was not a truthful witness. He submitted that she was coached to fabricate a story. Further, the prosecution's case rested solely on the testimony of a single identifying witness, and both courts below failed to exercise caution in relying on such evidence. Further, he claimed there was no direct evidence linking the appellant to the alleged offence. He relied on the case of Roria v Republic [1967] E.A. 583, urging that it was erroneous to convict based on improper identification.

15. He argued further that the first appellate court failed its duty as required and held in Okeno v R [1972] E.A., where it had to consider the evidence afresh and subject it to an exhaustive examination.

16. The appellant contended further that the prosecution failed to call crucial witnesses. He gave the example of the prosecution's failure to call PW2's father as a witness. He claimed that Section 143 of the *Evidence Act* and Section 150 of the *Criminal Procedure Code* were not complied with, leading to a miscarriage of justice.

17. Regarding his defence, he asserted that he had provided a chronological account of the events that occurred on 1st and 2nd May 2016, that he never had time to meet PW2 and had no information on her and neither was she known to him. Additionally, DW2 corroborated his testimony.

18. On the sentence meted out, he urged that the same was disproportionate. He urged this Court to intervene, asserting that the minimum mandatory sentence prescribed by Section 8(3) of the *Sexual Offences Act* took away the court's discretion in determining the sentence. In support of his contention, he cited the case of Maingi & 5 Others v *Director of Public Prosecutions & Another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR).

19. He further contended that the sentence was harsh and excessive. In support, he cited the case of Evans Wanjala Wanyonyi v Republic [2019] KECA 679 (KLR), where the court determined that the

enhanced mandatory 20-year term of imprisonment imposed by the trial judge was unwarranted and substituted it with a 10-year term of imprisonment.

20. In opposing the appeal, the respondent filed submissions dated 9th September 2024. On the contention that penetration was not proved and the appellant was not subjected to a DNA examination, it was submitted that PW1 testified that he examined PW2, provided treatment, and completed the P3 form. It was PW1's evidence that PW2's hymen had been recently broken; she experienced pain in her thighs and had been defiled. Further, in Section 2 of the *Sexual Offences Act*, penetration can be either partial or full.

21. On failure to conduct a DNA test, it was submitted that this did not negatively impact the prosecution's case. There was primary evidence from PW2, who testified that the appellant had defiled her, a person well-known to her. Her evidence was that of recognition rather than that of a single identifying witness.

22. Regarding the failure to call PW2's father as a witness, the respondent contended that the omission did not adversely affect the prosecution's case since PW2's father was not present during the incident. Additionally, PW3, the grandmother of PW2, testified, and her evidence supported that of PW2. Furthermore, it was contended that in Section 43 of the *Evidence Act*, there is no requirement for a specific number of witnesses to prove a fact in a criminal trial.

23. As regards the appellant's defence, the respondent submitted that the two courts below duly considered it. The appellant gave an unsworn statement and called one witness; however, the court found the defence lacked merit, and to the contrary the evidence presented by the prosecution was found to have been corroborative in all significant aspects of the case. It was direct, consistent, reliable, and compelling, with no contradictions or inconsistencies. It placed the appellant at the crime scene at the relevant date, location, and time.

24. Regarding the sentence meted out, the prosecution relied on a recent decision of the Supreme Court of Kenya in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) and Others (Petition No. E018 of 2023 [2024] KESC 34 (KLR), and urged that the conviction is sound, the sentence is lawful, and not punitive, especially considering the victim's age at the time of the incident.

25. This being a second appeal, the court is restricted to addressing itself to matters of law only. Section 361 of the *Criminal Procedure Code* restricts the mandate of this Court in second appeals inter alia as follows: -

    1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—

        a. on a matter of fact, and severity of sentence is a matter of fact; or

        b. against sentence, except where a sentence has been enhanced by the High Court unless the subordinate court had no power under section 7 to pass that sentence.

    2. On any such appeal, the Court of Appeal may, if it thinks that the judgment of the subordinate court or of the first appellate court should be set aside or varied on the ground of a wrong decision on a question of law, make any order which the subordinate court or the first appellate court could have made, or may remit the case, together with its judgment or order thereon, to the first appellate court or to the subordinate court for determination, whether or not by way of rehearing, with such directions as the Court of Appeal may think necessary.

26. The court has echoed Section 361 of the Criminal Procedure Act and will also not normally interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence, are based on a misapprehension of the evidence, or the courts below acted on wrong principles in arriving at their findings, as stated in the case of George Kamau Gatogo v Republic Civil Appeal No. 21 of 2011 cited with approval the holding in Kaingo v R [1982] KLR 213 where the court held that; -

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on the second appeal is whether there was evidence on which the trial court could find as it did (Reuben Karari C/o Karanja vs R [1956] 17 EACA 146)."

27. We have revisited the record and considered it in light of the rival arguments set out in the submissions by the appellant and the respondent. The issues that turn on this appeal are:

(i) whether the ingredients of the offence of defilement were proved to the required standard;

(ii) whether the prosecution had a duty to call the complainant's father as a witness;

(iii) whether the two courts below failed to consider the defence evidence and mitigation; and

(iv) whether this Court can consider the question whether the sentence is disproportional or not.

28. Section 8(1) of the Act states that where a person commits an act which causes penetration with a child, he is guilty of the offence of defilement. Three ingredients of the offence are necessary to establish the offence of defilement. Whether the victim of the offence is a child, proof that penetration occurred, and the perpetrator of the offence is identified.

29. The first appellate court was accused of failing in its duty to analyse the evidence before it, which makes it necessary for this Court to go through the evidence. The complainant's age was not disputed. The two courts below established that she was 14 years old at the time of the incident. However, the appellant claims that identification was improper and penetration not proved. The evidence of both identification and penetration placed before the trial court is that of PW2, who testified that the appellant lured her to his house and defiled her. The two courts below believed the facts as narrated by PW2, who testified that she knew the appellant, who was a butcher man and lived in a room behind the butchery. The appellant did not deny that he ran a butchery and lived in a room behind it. PW2 further informed the court that the appellant called her to the butchery, told her he wanted to have sex with her and carried her to his house, placed her on the bed and had sex with her.

30. PW1, a Clinical Officer from Sagana Sub-County Hospital, informed the court that he examined PW2 a day after the alleged incident. While examining her, he observed that she had painful thighs; although her labia majora and labia minora were normal, she had blood discharge on the virginal opening; her hymen was broken and freshly so. He formed the opinion that PW2 had been defiled. This is what the trial court stated in its findings: -

> " With regard to who the perpetrator was, the complainant stated that on her way to her aunt's home, the accused called her to his butchery and she responded by going to where he was...
>
> I had the opportunity of observing the demeanour of the complainant, and although she had half way declined to testify and she later gave her reasons for her refusal to answer questions, I have nevertheless no reason to doubt her evidence. She was treated in a matter of hours, her hymen was found to have been freshly broken, and it is clear that the accused was the perpetrator."

31. PWI's evidence, coupled with the evidence of PW2, leaves no doubt that PW2 was defiled. The medical evidence of PW1 was based on the injuries sustained, the examination and findings, and not on the narrative of PW1 per se. The appellant complained that he was not tested, and no DNA was undertaken. Further tests, including a DNA examination, would have complemented the evidence presented. However, the lack of such tests did not weaken the evidence placed before the court.

32. As for identifying the perpetrator of the offence, PW2 was very clear and categorical regarding who had defiled her. The proviso to Section 124 of the *Evidence Act* only requires that the trial court believes the testimony of the victim of a sexual offence. The section states:

> " 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."

33. We have looked at the determination of the High Court and take note that the determination from paragraphs *6* to *23* was devoted to the analysis of the evidence adduced before the trial court, culminating in the court stating:

> " The entire evidence on record left no doubt, as the trial court found, that the appellant defiled PW 2 in the manner described. The trial court considered all the evidence presented and, having done so, came to a proper and inevitable conclusion, that of guilt of the appellant. The appeal is without merits and is dismissed."

34. As seen above, this Court has no reason to fault the two courts below for their analysis of the evidence and the guilty verdict they both returned.

35. Regarding the sentence, Section 361 of the *Criminal Procedure Code* restricts our interference with the trial court's exercise of discretion. Further, Section 8(3) of the Act provides that a person convicted of the offence of defiling a child between the age of twelve and fifteen is liable upon conviction for a term of not less than 20 years. Exercising its discretion, the trial court meted out the sentence. We would again have no basis upon which to interfere with a lawful sentence.

36. Ultimately we find the appeal lacking in merit. The conviction is safe and sentence in accordance with the law. The appeal is dismissed.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR