



**Mutahi v Republic (Criminal Appeal 88 of 2018)
[2024] KECA 1282 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1282 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 88 OF 2018
P NYAMWEYA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 20, 2024**

BETWEEN

JOSEPH KARIUKI MUTAHI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (A. Mshila J.) dated and delivered on 19th July 2017 in High Court Criminal Appeal No. 22 of 2017 arising from the original Trial in Mukurweini Criminal Case No. 3 of 2017)

JUDGMENT

1. Joseph Kariuki Mutahi, the Appellant herein, has challenged the dismissal of his first appeal by the High Court, which he had lodged against his conviction for the offence of defilement, and the sentence of 20 years' imprisonment that was imposed by the Principal Magistrate's Court at Mukurweini (hereinafter 'the trial Court'). The particulars of the offence were that on the night of 3rd and 4th January 2017 at xxxx Town in xxxx sub county of the Nyeri County he intentionally caused his penis to penetrate the vagina of BWW, a child aged 12 years. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.
2. The relevant facts giving rise to this appeal are stated in the testimony of the witnesses during the Appellant's trial. On 3rd January 2017, BWW (who testified as PW1) went to the shops at xxxx at 5.00 pm, and on her way, she met the Appellant on the road, who told her that he wanted to take her for a tour, and that she prepares her clothes. BWW duly packed her clothes in a bag and left with the Appellant, who drove them in a motor vehicle to a place called xxxx, where they arrived at about 8.00 pm. He then bought BWW chips, and they went to a room 6 in a lodging, where the Appellant requested her to be his wife, and he inserted his 'organ' into hers and ordered her to be quiet. During her testimony BWW gestured to the area where the organ was inserted, namely her genitalia.



3. When they woke up at 6.00 am the next day, the Appellant told BWW that he did not want to be arrested and warned her against telling what had happened to any person, and BWW then went to look for work after he left her in the room. Upon inquiring for work at a shop, the shopkeeper took her to the police station, and the police took her to the hospital after she told them she had been defiled. BWW identified the Appellant as the person who took her to the lodging during the trial, and stated that he was not known to her previously.
4. AW (PW5) was working at the said lodging on 3rd January 2017, when a boy who was previously known to her arrived at 9.00 pm and told her that he wanted a room. She asked him to pay Kshs 250/- and gave him room 6. AW worked until the next morning and at about 7.30 am she saw a girl outside room 6, who requested to rest in the room. Later, police from xxxx came to the lodging with the girl, and she told the police that she had seen the girl in the lodging at 6am. AW identified the boy who paid for the room in Court as the Appellant.
5. BWG (PW2) was at her shop on 4th January 2017 when at about 9.00 am BWW came to the shop and asked for a job, and told her that she was chased from xxxx Primary School over non-payment of fees of Kshs 500/-. BWG contacted the headmaster of the said school who confirmed that BWW was missing from school, and she asked him to contact BWW's grandmother. BWG then took BWW to the Gakindu police post, and was advised to take BWW to hospital for examination. BWG stated that she did not know the Appellant and that BWW did not tell her anything about the Appellant.
6. JWG, BWW's grandfather (PW3), who had been looking for BWW since she left home on 2nd January 2017, was called by the police from Gakindu Police post on 4th January 2017. When he arrived at the Police post he was informed that BWW had been taken to the hospital for examination, and BWW later took them to the lodging where she informed him she was defiled by the Appellant. JWG did not know the Appellant before that date. JWG contacted BWW's mother, CW (PW4), who lived in Nairobi. BWW was CW's first-born daughter, having been born on 18th June 2004 and CW produced the clinic card showing this date of birth. CW went to Gakindu police post on 5th January 2017 after her father (JWG) called her on 4th January 2017 and told her that BW had disappeared, and that he had got a report from police in Gakindu that she had been found. She met BWW at the police post, who then took her, the police and grandfather to the lodging where she had slept with the Appellant. A lady at the lodging was arrested, and disclosed that BW had slept with one Kariuki, who was then arrested at his home.
7. CPL Mwanwero Bongo (PW 7) was at Gakindu police post when on the 4th January 2017 at 2.30 pm, a juvenile was brought to the police post by members of the public, namely the head teacher Gatura Primary School, and a lady called BWG . They reported that the juvenile had been defiled in a lodging known as Gakindu Last Bar. He issued them with a P3 form and advised that the victim to be taken to Murukweini for examination and treatment. He then visited the lodging and met Agatha, who BWW recognized as the person who gave them the room. His investigations revealed that the Appellant booked room 6, which was also confirmed by BWW; that BWW was 12 years old; and he produced BWW's birth certificate showing that she was born on 18th June 2004. Cpl Bongo then arrested Agatha to assist in tracing the Appellant, and on 5th January 2017 BWW took them to the Appellant's home at Gatura and they arrested him in his house. He stated that the Appellant was not known to him before.
8. After examining BWW, Simon Kungu (PW6), a clinical officer at Mukurweini Sub County Hospital examined BWW and filled a P3 form in which he noted that BWW's hymen was broken; there was perforation of her labia minora; there was no discharge or bleeding from the genital organs; and that she HIV was negative. A high vaginal swab done on BW revealed that there were no spermatozoa. He formed the opinion that BWW was defiled.



9. When put on his defence, the Appellant gave sworn evidence and called one witness. He testified that on 3rd January 2017, he left Mukurweini at 1.00 pm to visit his friend Alex Gitonga in Nyeri to help him look for a job, and they met in the friend's office at around 6.00 pm and later went to his house for dinner. After dinner, the Appellant left his friend's house at about 8.00 pm and boarded a motor vehicle belonging to the Namugo Sacco at 8.30 pm back to Mukurweini, and he produced receipts of his travel to and from Nyeri issued by the said Namugo Sacco.
10. Alex Gitonga (DW2), who was at the time remanded as GK Prison Remand for the offence of breaking and stealing having been charged on 15th February 2017 in Nyeri Court, stated that on 3rd January 2017 he was working in Nyeri and that the Appellant was a friend; and that on 3rd January 2017 he was working in Nyeri, and the Appellant requested him to take him to two security offices in Nyeri to look for a job, which he did. He later joined the Appellant at a hotel at 7.00 pm and they took tea, and Alex then escorted him to the bus stage and the Appellant boarded a motor vehicle and left at 8.00 pm.
11. The prosecution then called Samuel Gichuki Muturi, the stage manager of Namuga Sacco, who told the Court that they start operations from 6.00 am to 6.30 pm. and at 8.00 pm no office is open at Mukurweini. That in Nyeri, the office closed at 7.00 pm and were not open beyond 8.00 pm. Further, that no receipts are issued at 8.00 pm. He testified that the serial numbers of the receipts issued to the Appellant appeared to be from the same receipt book, and the two could not have been issued from Mukurweini and Nyeri as they appeared.
12. The trial Magistrate (Hon. R. O. Oigara PM) delivered a judgment on 21st April 2017 and after setting out the evidence adduced during the trial, found that the charge of defilement had been proved to the required standard and convicted the Appellant for the offence. The Honourable Magistrate dismissed the Appellant's defence as an afterthought created to save him, and sentenced him to serve a jail term of twenty (20) years after considering his mitigation. The Appellant was aggrieved by the decision by the trial Court and proffered his first appeal to the High Court, being Nyeri Criminal Appeal No, 22 of 2017.
13. In a judgment dated 19th July 2018, the High Court (A. Mshila J.), dismissed the appeal after finding that the omission of the words 'as read with' in the charge sheet did not occasion any miscarriages of justice or prejudice to the Appellant, since the particulars on the charge sheet clearly stated that the child was aged twelve (12) years which placed it within the provisions of Sections 8 (3) of the *Sexual Offences Act*; and the Appellant was always aware of the nature of the charge against him; and the essential elements of the offence were disclosed to him. In addition, that the prosecution proved its case and all the ingredients of the offence to the desired threshold since the Appellant was a person well known to the minor and he was positively identified by recognition, and the prosecution proved the age of the minor and penetration. Lastly, that the Appellant's alibi defence did not displace the prosecution's case, given that the Appellant was positively identified by PW 1 and PW 5 who placed him at the scene of crime on the material date.
14. The Appellant was equally dissatisfied with the decision in the High Court and has proffered the instant Appeal in which he has raised six (6) grounds of appeal that challenge the age of the victim, the procedure of the trial, the sufficiency of the evidence adduced during the trial and the rejection of his defence. We heard the Appeal on this Court's virtual platform on 6th March 2024 and the Appellant, Joseph Kariuki, was present in person appearing virtually from Nakuru Prison, and he relied on his undated written submissions. Learned Prosecution Counsel, Mr. Naulikha, appeared for the Respondent and relied on written submissions dated 21st November 2023.



15. The role of this Court as a second appellate Court was set out in *Karani vs R* (2010) 1 KLR 73 as follows:

“This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered matters, they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law.”

16. The first issue of law raised by the Appellant is that of the proof of the victim’s age; that the Appellant in this respect contended that BWW’s mother stated that BWW was born on 18th June 2004, and therefore, BWW would have been 14 years old at the date of the incident. Accordingly, all the evidence adduced by witnesses concerning the age of BWW was not correct. The learned Prosecution counsel on his part submitted that the victim’s mother, CW, testified that BWW was born on 18th June 2004 and tendered the clinic card which was admitted. Therefore, the age of the minor was established, and that the victim being 12 years old at the time of the incident, the punishment of 20 years in prison was lawful, legal and not excessive or punitive.

17. It is evident that the Appellant does not dispute that BWW was born on 18th June 2004, and his assertion is that there was an error in the computation of age at the time of commission of the crime. Both the trial Court and High Court found that the said date of birth was supported both by the testimony of the victim’s mother CW(PW4), as well as the evidence of the investigating officer (PW7), who produced the birth certificate showing BWW’s date of birth as being 18th June 2004. According to the particulars of the charge sheet and evidence adduced during the trial, the offence was committed on the night of 3rd and 4th January 2017. An arithmetic calculation shows that the as at January 2017, BWW was 12 years and 6 months old.

18. BWW was therefore proved beyond reasonable doubt to be a minor. The only question we need to answer is whether the Appellant was charged and convicted under the correct provisions, namely Section 8 (1) and (3) of the *Sexual Offences Act*. In this respect it is notable that Section 8(1) creates the offence of defilement of a minor, while Section 8(3) provides that 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. We therefore find no error both in the computation of the victim’s age, nor the provisions under which the Appellant was charged, convicted and sentenced.

19. The second issue of law raised by the Appellant was in regard to defective procedure during the trial. The Appellant submitted that the trial Magistrate and the Appellant Judge erred in law because no one noticed that in the whole trial record “there was no substance after the Appellant took plea”. Additionally, that the trial Magistrate did not apply Section 211 of the *Criminal Procedure Code* before putting the Appellant to his defence according to the law. Section 211 of the Criminal Procedure Code requires that the rights of an accused person be explained to him at the close of the prosecution case and when he is being put on his defence. These rights are:

- a. The right of remaining silent and saying nothing.
- b. The right to make an unsworn statement from the dock in which event the accused is not liable to cross examination by the prosecution.



- c. The right to give sworn evidence from the witness box in which event the accused becomes liable to cross examination by the prosecution if the prosecution wishes.
 - d. The right to call witnesses if the accused so wishes.
20. We however find these allegations to have no substance, since the trial record shows that on 9th January 2017 the charge was read out to the Appellant in Kikuyu language and when he was asked whether he admitted or denied the truth of the charge he replied “not true” and the trial thereafter proceeded. In addition, on 10th April 2017 when the defence hearing commenced, the record shows that the Court recorded that:
- “The accused has (sic) explained the options available to him to make his defence who elects:
Accused- sworn statement”
- From the record, it is also evident that the Appellant proceeded not only to give a sworn statement, but also called a defence witness to testify on his behalf.
21. The third issue of law raised by the Appellant was that the evidence adduced by the prosecution was not sufficient to support his conviction. The Appellant argued that there was no evidence that he was at Gakindu East Bar, or that he booked a room. He submitted that PW5 did not produce a receipt to prove that the Appellant slept there. Additionally, PW 5 only saw BWW in the morning when she asked to rest at room 6, and that the only person alleged to have seen the Appellant and BWW together was the watchman who was not called as a witness. Therefore, the prosecution did not prove that the Appellant was at the scene of the crime, and in any event, it was BWW’s evidence that she did not know the Appellant before the incident. On the other hand, that the Appellant told the Court where he was on the material day, and even brought a witness to prove his whereabouts.
22. The learned Prosecution counsel in reply submitted that the medical examination of BWW by PW 6 and the subsequent report in the P3 form were conclusive evidence of penetration which constituted the offence of defilement. PW 6 concluded that the hymen was broken and there were lacerations on the labia minor and labia major, and there was no other report prepared by the Appellant to challenge the findings made by PW6. Furthermore, that BWW gave a vivid account of events from 3rd January 2017 when she met the Appellant and where the Appellant took her before defiling her throughout the night in a lodging in room 6, and her testimony was consistent and firm that the Appellant used his male organ to penetrate and have sex with her and there was no evidence to prove otherwise.
23. It was thus the Respondent’s submission that they proved their case that beyond any reasonable doubt; that the evidence on record was consistent and cogent, and corroborated each other in all material ways; there was no inconsistencies or contradictions in the evidence tendered by the prosecution; and the evidence of BWW, PW 3 and PW 5 placed the Appellant at the scene on the material date. Lastly, that any forms of inconsistencies and contradictions found to exist were not fatal to the prosecution case, and the Appellant did not suffer any prejudice whatsoever. On the alibi defence, the learned Prosecution counsel submitted that the Appellant produced fake matatu fare tickets from Namuga Sacco which was debunked by the prosecution when they called a manager from Namuga Sacco who denied knowledge of the matatu tickets. Consequently, the Appellant’s defence of alibi was displaced.
24. We reiterate the holding by this Court (Makhandia, Ouko & Murgor JJ.A.) in *John Mutua Munyoki vs Republic* [2017] eKLR that under the *Sexual Offences Act*, the main elements of the offence of defilement, and which therefore need to be proved are as follows:
- i. The victim must be a minor, and



- ii. There must be penetration of the genital organ and such penetration need not be complete or absolute. Partial penetration will suffice.
- 25. We have already found that the age of the minor was proved by the evidence of PW4 and PW7. As regards penetration by the Appellant, we find the evidence of BWW, PW5 and PW6 to have sufficiently proved this fact. The perceived gaps in the evidence pointed out by the Appellant are neither relevant nor fatal in this respect, and the prosecution did also bring evidence to prove that the Appellant's alibi evidence was fabricated, and therefore did not displace the evidence that placed him at the scene of the offence.
- 26. We accordingly find that this appeal has no merit, and it is hereby dismissed in its entirety.
- 27. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024

P. NYAMWEYA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.

