



REPUBLIC OF KENYA



KENYA LAW
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**Mukuna v Republic (Criminal Appeal E017 of 2023)
[2025] KEHC 918 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E017 OF 2023
RE ABURILI, J
JANUARY 31, 2025**

BETWEEN

SAMWEL MUKUNA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment and sentence delivered on 29th March, 2023 by Hon
A.K.Mokoros, Senior Principal magistrate in Tamu SPM SO Case No. E039 of 2021)*

JUDGMENT

1. The appellant herein Samwel Mukuna was charged with the offence of defilement contrary to section 8 (1) (3) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars being that on diverse dates between 18th to 20th November 2021 at [Particulars Withheld] within Kisumu County the appellant intentionally caused his penis to penetrate the vagina of M.A. a child aged 14 years.
2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#). The complainant was the same as in the main charge above.
3. The appellant denied committing the offence and the prosecution called five (5) witnesses in support of its case. The appellant on being placed on his defence, gave sworn and called 3 more witnesses in his defence.
4. In his impugned judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The trial court considered the appellant's mitigation as well as the victim impact assessment report and sentenced the appellant to serve 20 years' imprisonment.
5. Aggrieved by the sentence imposed, the appellant filed his petition of appeal on the 17th April 2024 raising the following grounds of appeal:



1. That the trial magistrate erred in law by failing to observe that the prosecution did not prove their case beyond any reasonable doubt.
 2. That the trial magistrate erred in both law and fact by relying on evidence that were contradictive before convicting and sentencing me to 20 years in jail.
 3. That the trial magistrate erred in law by awarding me a manifestly harsh and discriminatory sentence.
 4. That the sentence awarded did not consider the appellant's rights and fundamental freedoms as spelt in the constitution of Kenya 2010.
 5. That the appellant was not awarded a fair hearing according to Article 50 (2) of the Constitution.
 6. That other grounds shall be provided for when the trial proceedings shall be forwarded to the appellant.
6. The appeal was canvassed by way of submissions. The appellant filed written submissions while the respondent made oral submissions.

The Appellant's Submissions

7. It was submitted that the prosecution undertook wrong and inhumane procedures thus exposed the appellant to an unfair trial process. The appellant claimed that although DNA was done, the same was not used by the prosecution thus prompting request for the same in his mitigation. The appellant further submitted that the police obtained a confession from the complainant after she was beaten by the police officers.
8. The appellant further submitted that the evidence presented by the prosecution was full of major inconsistencies, contradictions and discrepancies that go to the root of the prosecution's case and which necessitate a reversal of the trial court's conviction and sentence.
9. It was submitted that the trial court failed to consider the circumstances of the case prior to passing its sentence like the conduct of the complainant, the appellant's age as well as his conduct following his incarceration where he has helped fellow inmates in their pursuit of their Secondary School Education.

The Respondent's Submissions

10. Mr. Marete Senior Principal Prosecution Counsel for the State made oral submissions opposing the appeal against conviction and sentence. It was his submission that the evidence proved the offence beyond reasonable doubt.
11. Mr. Marete submitted that the age of the complainant was proved by production of a birth certificate, that penetration was proved by the testimonies of the complainant and the doctor and that the complainant identified the assailant.
12. It was submitted that the sentence was lawful as per the law and this court ought not interfere with the same.

Analysis & Determination

13. The role of the first appellate court is now well settled as was stated in the case of *Okeno v R* [1977] EALR 32 and later in *Mark Oiruri Mose v R* [2013] eKLR among other many decisions that this



Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it reach its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

14. The evidence before the trial court was as follows: The complainant testified as PW5. It was her testimony that on the 18th November 2021, her mother sent her to the shop to buy oil and other things at 8pm. That on the way, she met S who called her by name prompting her to stop during which she informed him that she was heading to the shop and S informed her that he would wait for her.
15. It was her testimony that she took the goods home then returned to S with whom they proceeded to his house. That S bought her food and when she asked to go home, he refused, removed his t-shirt and told her to remove her top. The complainant testified that S touched her breasts and asked for sex. The complainant detailed how S had sex with her from removing his and her clothes, putting on a condom and putting his penis into her vagina.
16. The complainant testified that the following day, S left her Kshs. 15 for breakfast and locked her in the house. She testified that she slept in the house for two days during which she had sex with S. It was her testimony that when she left the house on the second day, she went to her sister's place where her brother and father came and found her and took her to the police where she was beaten and revealed everything that had happened. She identified the appellant as S. The complainant reiterated her testimony in cross-examination.
17. PW4 Jared Olala, a clinical officer at Jaramogi Oginga Odinga Teaching and Referral Hospital (JOOTRH) testified and produced the complainant's P3 Form and Lab request and PRC report as P Exh. 2 and 3 respectively. He testified that he examined the complainant while he worked at Muhoroni County Hospital. It was his testimony that he did not find anything on the complainant's vaginal examination but that there were epithelial cells which is a sign of inflammation on the vaginal wall. He testified that he made a conclusion that the complainant had a urinary tract infection and that she was a victim of sexual defilement. PW4 reiterated his testimony in cross-examination and re-examination.
18. PW3 No. 23528 Chief Inspector Everline Kemunto testified that she received a report of the complainant's abuse and followed up on the same as they proceeded to where the complainant was defiled and found the appellant's house locked. She testified that she sent 2 officers who arrested the appellant. It was her testimony that the complainant was 14 years' old which she corroborated by producing the Birth Certificate as P Exh. 2. It was her testimony that the complainant stated that she was defiled by two men and the appellant.
19. In cross-examination, PW3 testified that she arrested 3 people in connection with the defiling of the complainant two of whom were minors and the cases against them diverted. She denied doing a DNA analysis on the appellant.
20. PW1 and PW2 are the complainant's step-father and mother respectively and they corroborated the complainant's testimony about her going missing. They both testified that the complainant was 14 years old.
21. The appellant testified as DW1 giving a sworn testimony denying the charges against him. He testified that on the 18.11.2021 he left school due to school fees and looked for a house from where he would hustle for fees which house, he got on 20.11.2021. He testified that on that night at 10.30pm he was accosted by police officers who inquired whether he was B to which he responded in the negative. He testified that he was then arrested and taken to the police station where the complainant under pressure identified him as B.



22. DW2, ZN, the appellant's landlord testified that the appellant came looking for a house from her on the 19.11.2021 and she told him to return on the 20.11.2021 when she gave him the house. She testified that she did not see any girl in the house on the 20.11.2021 but heard that he had been arrested on the 20.11.2021.
23. In cross-examination, DW2 admitted that she did not live in the plot with the appellant and as such she could not know who got in the appellant's house or if he defiled the complainant.
24. DW3, ZO testified that he lived in the same plot as the appellant, that prior to 20.11.2021 an individual called B lived in the appellant's house but had moved out before the said date. He testified that he learnt that the appellant moved therein though he did not know the exact date that he had moved in. In cross-examination, DW3 admitted that he had seen the complainant before and that he was not there when the accused moved into the house.
25. DW4, VR testified that he used to work for the appellant. He testified that on the 19.11.2021, he went to the appellant's home looking for work and the appellant sought his help in getting a house which they found on the 20.11.2021. He further testified that the appellant later told him that he had got the house and that the appellant asked him to visit him but he declined. He testified that he later learnt from the appellant's mother that the appellant had been arrested.

Determination

26. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant who is self-represented and the prosecution counsel appearing for the Respondent State. I find the following issues for determination:
 - a. Whether the appellant's constitutional right to a fair trial was infringed,
 - b. Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt and
 - c. Whether the sentence meted out on the appellant was manifestly excessive, harsh and unconstitutional.

Whether the appellant's constitutional right to a fair trial was infringed

27. The appellant impugned his conviction and sentence on the grounds that his right to a fair trial was infringed. He cited the fact that the prosecution failed to present the DNA evidence that they had undertaken which raised issues as to why the same was not presented. The appellant further faulted the prosecution on account of the fact that they obtained a confession from the complainant after beating her.
28. Article 50 (2) of *the Constitution* guarantees every accused person the right to a fair trial. The Article provides:

“(2) Every accused person has the right to a fair trial....”
29. The aforementioned Article goes on to provide the specific rights that constitute a fair trial. The applicant herein has not specifically mentioned what specific right was infringed. To this end, this claim fails to meet the specificity test as enumerated in the celebrated authority of Anarita Karimi Njeru (No.1) (1979) 1 KLR 154 where it was held inter alia that it is not enough to allege constitutional violation but one must be plead the specific violation and proceed to demonstrate the same.



30. That aside, the appellant alleged that a DNA was carried out and the results left out of the evidence by the prosecution. However, there is no evidence in the entire trial court record that a DNA test was carried on either the appellant or the complainant. PW4, the clinical officer who examined the complainant testified that he also examined the appellant on 26.11.2022 but that the test on him was unremarkable.
31. Under Section 143 of *Evidence Act* (Cap 80) Laws of Kenya, no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.
32. The case of *Bukenya & Others vs Uganda* [1972] E.A. 549 is the locus classicus on the issue of failure to call crucial witnesses where the Court of Appeal for Eastern Africa held that:
- “The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”
33. In *Julius Kalewa Mutunga v Republic* [2006] eKLR, the Court of Appeal held that:
- “...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”
34. In the case of *Bukenya & Others vs Uganda* (supra), the court was clear that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will therefore only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, adverse inference will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.
35. In the case of *Keter v Republic* [2007] 1 EA 135 the court held inter alia that:
- “The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt.”
36. I have perused the evidence adduced in the lower court and I find no witness who stated that DNA was done on the appellant but failed to adduce that evidence by producing the DNA report. Bien examined in hospital together with the complainant is not the same as DNA or that the examination was for purposes of DNA sampling. I find the allegation by the appellant to be far-fetched. This court cannot therefore direct what evidence the prosecution calls in support of its case as this fall within the ambit of the prosecution itself.
37. The appellant also alleged that the complainant’s confession was obtained after she was exposed to beatings by the police and thus this exposed him to an unfair trial. I must note that despite the complainant testifying that she was beaten prior to revealing what had happened during the time she had gone missing from home.
38. I have examined the complainant’s testimony, the complainant at no time in her testimony did she state that the fact of the appellant defiling her was made up. In fact, in cross-examination, the complainant reiterated that the appellant had defiled her and reiterated the details of the said defilement and that



the appellant locked her in the house in the morning when he left despite giving her Ksh 15/ meant for breakfast. The fact that the complainant was disciplined by her parents for going missing and to reveal where she had been and what had transpired to her, in no way suggests that she was forced to confess against the appellant herein.

39. Taking all the aforementioned into consideration I thus find that this limb of the appeal thus fails.

Whether the prosecution's case against the appellant herein was proved beyond reasonable doubt

40. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of *George Opondo Olunga v Republic* [2016] eKLR that the ingredients of an offence of defilement are: identification or recognition of the offender, penetration and the age of the victim. The prosecution was therefore under a duty to establish or prove all the above elements of defilement beyond reasonable doubt. That duty or burden of proof does not shift to the accused person who is under no duty to adduce or challenge evidence adduced by the prosecution witnesses. The accused was also under no duty to give any self-incriminating evidence.
41. The appellant's identity is not in issue, the complainant testified that she had known the appellant since 2020 and further she testified that she stayed in the same house with the appellant for two days during which they had sex and as such she was familiar with him. This testimony remained watertight even in cross examination.
42. Regarding the complainant's age, she testified that she was 14 years old at the time of the incident, a fact that was corroborated by the testimony of PW1 and PW2 her step-father and mother respectively. PW3 also produced the complainant's birth certificate as P Exh 2 that showed that the complainant was born on the 23rd February 2007 and as such the complainant was 14 years and 9 months at the time of the incident.
43. On the issue of penetration, 'Penetration' is defined under Section 2 of the *Sexual Offences Act* to mean 'the partial or complete insertion of the genital organs of a person into the genital organs of another person'. The complainant testified that she had sex with the appellant for two days. The complainant testified in detail how she had sex with the appellant on the first day and the second day including how the appellant used a condom when they had sex and how after the first day, the appellant locked her in despite giving her money to go and buy breakfast.
44. On his part the appellant denied committing the offence and stated that he only occupied the house where the incident occurred on the 20.11.2021 the same day he was later arrested. The appellant's witnesses including his landlord however could not tell with specificity when the appellant occupied the said house including the appellant's landlord, DW2, who was best placed to know this detail.
45. DW3, the appellant's neighbour admitted to seeing the complainant before. I found the testimony of DW4, the appellant's worker to be rather contradictory. He testified that he went to look for a house with the appellant on the 19.11.2021 which they got on the 20.11.2021 and subsequently goes on to state that it was the appellant who informed him that he had got the house.
46. Section 124 of the *Evidence Act* provides that:

'Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the 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 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.'

47. The evidence of the complainant on the fact of her being defiled was corroborated by that of PW4-Jared Olala, the clinical officer as indicated in the P3 form adduced as P Exh 2. PW5, the complainant, was firm in her testimony that the appellant defiled her and the details of the said defilement.
48. Taking into consideration the evidence adduced by the prosecution witnesses vis-à-vis that of the appellant, it is my view that the evidence presented by the appellant was an afterthought. The appellant's witnesses in my view did not aid to his defense. The landlord who had conduct of the appellant's occupation of the said house was not in a position to confirm when the appellant occupied the said house, further the appellant's neighbour similarly was not in a position to elucidate as to when the appellant occupied the said house though he admitted seeing the complainant in the vicinity.
49. Further, I have considered evidence adduced by the witnesses for the prosecution as a whole and in my view, I find no material contradictions as alleged. In any case the alleged contradictions and inconsistencies alleged are in my view not contradictions or inconsistencies. I therefore find no material contradiction in the evidence adduced by the prosecution witnesses. The Court of Appeal in the case of *Richard Munene v Republic* [2018] eKLR stated as follows on contradictions in evidence:

'It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.'
50. Accordingly, in this case, I find that the assertions that the prosecution evidence was contradictory was devoid of any merit. There was no material contradiction in the prosecution case as to prejudice the appellant. I therefore find that the prosecution proved the element of penetration beyond reasonable doubt.
51. On the whole, I find and hold that the prosecution proved its case beyond reasonable doubt against the appellant on the charge of defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No 3 of 2006 and that the conviction of the appellant for the said offence was sound.

Whether the sentence imposed on the appellant was excessive and harsh or unconstitutional.

52. As to whether the appellant's sentence was excessive, harsh or unconstitutional, Article 50 (2) (p) of [the Constitution](#), 2010, provides that:

'Every accused person has the right to fair trial, which includes the right.
(p)To the benefit of the least severe of the prescribed punishment for an offence, if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentence.'
53. In *Alister Antony Pariera v State of Maharashtra*, as cited in the case of *Margrate Lima Tuje v Republic* [2016] eKLR the court held that:

'Sentencing is an important test in matters of crime. One of the prime objectives of the criminal law is the imposition of an appropriate, adequate, just and proportionate sentence



commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused in proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.'

54. I note that section 8 (3) of the *Sexual Offences Act* provides that upon conviction, the offender shall be imprisoned for a term of not less than twenty years. Previously, the principle laid down by the Supreme Court Francis Karioko Muruatetu & Another v Republic [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with *the Constitution*.
55. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the Muruatetu (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis. See Jared Injiri Koita v Republic [2019] eKLR.
56. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentences fail to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of *the Constitution*. See Christopher Ochieng v Republic KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and Jared Koita Injiri v Republic, KSM CA Criminal Appe84567890al No 93 of 2014 [2019] eKLR
57. However, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR clarified the position and stated inter alia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the Penal Code, which was the case before the Supreme Court.
58. Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory,
59. Quite recently on 12 July 2024, the Supreme Court (Koome CJ&P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ) delivered its judgment where it allowed the petition of appeal to the extent of setting aside the judgment by the Court of Appeal in Nyeri in which it declared [mandatory] minimum sentences (as they were then referred) for sexual offences unconstitutional in that they limit the discretion of the court. The Supreme Court also ordered that the Respondent should complete his 20-year sentence from the date of imposition by the trial court.
60. The apex Court considered the following factors in allowing the appeal by the prosecution:

Gravity of Sexual Offences

61. In the judgment, the Supreme Court reiterated that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act*, or any other statute. The court agreed with the submissions of the amici curiae that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. The court went ahead to cite the amici's submissions on instances where courts have been influenced by myths, including that: attempted rape is not a serious offence;



the absence of separate physical injury renders the crime less serious; and the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability. The court proceeded to highlight the comparative lessons from different jurisdictions as submitted by the amicus.

Sentencing in Sexual Offences are Constitutional

62. In addition, the Supreme Court faulted the Court of Appeal for its declaration of [mandatory] minimum sentences unconstitutional since that was not an issue that had been raised by any of the parties before court and it was therefore a violation of the principle of stare decisis. The Court of Appeal was also faulted for failing to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, thereby leaving the declaration ambiguous, vague, and bereft of specificity. Further, the Supreme Court held that although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute.

Impact of the Judgment for Victims of Sexual Violence

63. The judgement recognizes the importance of the judicial processes including sentencing for victims of sexual violence as a limb of their right to access to justice. The Court in its judgement highlights the need for certainty in sentencing as essential for restoring the public's trust in the justice system. In conclusion, this judgment ensures that Courts must consider and center the victims in their analysis of the cases before them and the sentencing of perpetrators of sexual violence.

64. Notwithstanding the age of the appellant which was 22 years, the appellant ought to have known that defiling a 14-year-old girl was a crime. I find no reason to interfere with the lawful sentence imposed on him.

65. However, in computing the appellant's sentence, it is my view that the same should be calculated in line with the provisions of Section 333 (2) of the Criminal Procedure Code that mandates the court to take into consideration the time spent in custody. The appellant was arrested on 24.11.2021 and granted bond on the 1.12.2021 and subsequently released on the 2.12.2021, it appears he was in custody for 7 days.

66. In the circumstances, I find that in computing the sentence imposed on the appellant, the prisons authorities shall consider the period spent in custody by the appellant from the date of arrest until the date of being released on bond which was seven (7) days.

67. The upshot of the above is that the instant appeal against conviction and sentence is dismissed save for the seven days spent in custody to be considered in sentencing.

68. The judgment to be uploaded. Lower court file to be returned with a copy of certified judgment.

69. This file is closed,

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY VIA MICROSOFT TEAMS
THIS 31ST DAY OF JANUARY, 2025**

R.E. ABURILI

JUDGE

