



REPUBLIC OF KENYA



KENYA LAW
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**Mwithi v Republic (Criminal Appeal E058 of 2024)
[2025] KEHC 2238 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E058 OF 2024
DR KAVEDZA, J
FEBRUARY 25, 2025**

BETWEEN

JOSEPH MWITHI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on
21st December 2022 by Hon. J.M Ojwang (RM) at Kibera Chief Magistrate's
Court Sexual Offences Case no. E069 of 2021 Republic vs Joseph Mwithi)*

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that the appellant, on diverse dates between July 2020 and October 2020, at different times at the [Particulars Withheld] in Lang'ata Sub-County within Nairobi County, intentionally and unlawfully caused his male genitalia (penis) to penetrate the female genitalia (vagina) of M.M a female aged seventeen (17) years old. He was sentenced to serve fifteen (15) years imprisonment.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that the prosecution failed to prove its case beyond reasonable doubt.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



4. The prosecution's case was as follows: PW1, WK, grandfather of the complainant testified that in May 2021, he learned from his wife that the complainant and her elder sister were pregnant. He ascertained that the appellant, purportedly a pastor, visited their home between 14:00 and 21:00 for prayers, accompanied by the two girls. Upon observing changes in the complainant's demeanour, she disclosed that the appellant had impregnated her and that she resided with him. PW1 reported the matter to Lang'ata Police Station, prompting the appellant's flight. Subsequently, PW1 found the appellant with the girls, summoned an inspector, and facilitated his arrest. At the appellant's residence, PW1 discovered baby clothes and a clinic card listing the complainant as the appellant's wife.
5. PW2, the complainant (name withheld), testified that in April 2020, the appellant visited her home to pray for her ailing grandfather. By August 2020, he pursued her romantically, which she reciprocated. In October 2020, aged 17, she discovered her pregnancy. Her grandfather reported this to the police upon learning of it. She later found her sister was similarly impregnated by the appellant. PW2 attended prenatal care at Silanga Dispensary and performed domestic tasks at the appellant's home. She identified the appellant in court.
6. PW3, PC Joshua Mosot, the arresting officer, stated that on 11 June 2021, Inspector Alfred Monda directed him and PW4, PC John Mumba, to apprehend the appellant in Soweto following a defilement report dated 26 May 2021. Guided by PW1 and PW2, they arrested the appellant at his residence. PW4 corroborated PW3's account.
7. PW5, Alice Geri, a nursing officer, examined PW2 on 12 October 2021, post-delivery in July 2021 at Mbagathi Hospital. PW2 recounted her relationship with the appellant since April 2020. Examination revealed healed childhood burn scars on PW2's left thigh, a torn hymen, vaginal lacerations, infection, and blood-stained discharge, treated subsequently. PW5 confirmed PW2's birthdate as 28 November 2003 via a PRC form and recommended DNA testing.
8. PW6, PC Dickson Nzuki, the investigating officer, received PW1's defilement complaint on 26 May 2021. Investigations confirmed PW2, then eight months pregnant, was under 18 per school records. Clinic notes listed her as the appellant's spouse. A DNA report confirmed the appellant as the child's father with 99.9% certainty. PW3 and PW4 effected the arrest.
9. PW7, Joyce Kihoro, a government analyst, prepared a DNA report on 29 May 2022 using swab samples from the appellant, PW2, and her child, affirming a 99.9% probability of the appellant's paternity.
10. The trial court was satisfied that the prosecution had established a prima facie case, and the appellant was placed on his defense. DW1, Joseph Mwithi, narrated that in July 2020, he met the complainant who asked to be in a relationship with him and he agreed, right after she made sure she was of age by checking her ID and birth certificate. On 9th June 2021 at around 11:56p.m, he was arrested from his house and taken to Highrise Police Station. On 11th June, he was transferred to Lang'ata where he was kept in custody for two days.
11. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
12. Further, sections 8(1) and (4) of the *Sexual Offences Act*, No. 3 of 2006 provides thus:
 8. Defilement
 - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.



- (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

13. Bearing in mind the above provisions, I will now analyse the evidence on record to ascertain whether the essential ingredients of the offence preferred against the appellant were established to the required standard of proof. I wish to state at the outset that the importance of proving the age of a victim, proof of penetration, and positive identification of the assailant in sexual offences is paramount.
14. On the age of the complainant the trial court considered the PRC form prepared and adduced by PW5, the nursing officer who examined the complainant. The PRC form indicated that the complainant was born on 28th November 2003. This is corroborated by the high school report produced by the investigating officer PW6. She was 17 years old at the time of the offence. There is therefore no doubt that the complainant was a child.
15. With regard to proof of penetration, PW5, the nursing officer who examined the complainant noted that she had just given birth in July 2021, approximately three months prior to examining her. Further, PW7 the government chemist analyzed the samples from the complainant, the complainant's child, and the appellant, and her DNA report indicated that the appellant was the father of the complainant's child. This evidence by the prosecution satisfies the element of penetration.
16. On the identification of the assailant, both the complainant, and her grandfather identified the appellant in court as the man who used to go to their house for prayers when her grandfather was sick. Thus, the element of identification was met.
17. The court considered his defence and found it to be incredible. Given the foregoing, I find that the appellant's defence did not dislodge the cogent evidence adduced by the prosecution. In my view, the appellant's defence was properly dismissed by the trial court as an afterthought aimed at exonerating himself from the offence.
18. The upshot of the above analysis is that the prosecution proved their case beyond reasonable doubt. The conviction is hereby affirmed.
19. On sentence, the appellant was sentenced to serve fifteen (15) years imprisonment. During sentencing, the court considered the pre-sentence report, the appellant's mitigation, and that he was the first offender. The court sentenced the appellant to the minimum sentence provided under the law.
20. As such, I find that the sentence was proper in light of the supreme court decision in *Petition E018 of 2023 Republic vs Joshua Gichuki Mwangi*. In the end, the appeal is found to be lacking in merit and is dismissed in its entirety.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25TH DAY OF FEBRUARY 2025

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mutuma for the respondent

Appellant – present

Achode – court Assistant

