



REPUBLIC OF KENYA



KENYA LAW
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**Muthoni v Republic (Criminal Appeal 49 of 2023)
[2025] KEHC 4875 (KLR) (25 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4875 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL APPEAL 49 OF 2023**

KW KIARIE, J

APRIL 25, 2025

BETWEEN

JOSHUA KIMANI MUTHONI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO. 23 of 2020 of the Chief Magistrate's Court at Nyabururu by Hon. S.N. Mwangi -Senior Resident Magistrate)

JUDGMENT

1. Joshua Kimani Muthoni, the appellant in this case, was convicted of the offence of defilement in violation of section 8 (1) read together with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence are that on the 24th, 25th and the 26th day of February 2020, at [Particulars Withheld], Nyandarua West sub county, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of CGM, a child aged fifteen years.
3. The appellant was sentenced to twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction. He was in person. He raised grounds of appeal as follows:
 - a. The trial magistrate erred in both law and fact by failing to consider the medical report, which indicated that the hymen was broken but old and did not connect the appellant to the act.
 - b. The trial magistrate erred in law and fact by not considering that the doctor's report indicates that there were some fluids in the complainant vagina which he did not ascertain whether it belonged to the complainant or the accused persons.
 - c. The trial magistrate erred in law and fact by not appreciating the PRC report, whereby it was clear that there was nothing done like sexual intercourse as claimed by the complainant.



- d. The trial magistrate erred in law and fact by not considering that the complainant's aunt, who testified before the honourable court, said that she chased away the complainant from her home for the reason that she had a lot of male friends; hence, she could have been defiled elsewhere.
 - e. The trial magistrate erred in law and fact by failing to examine the complainant's statement in the first place, as she had said she had no sexual relationship with the appellant, and it was confirmed by her aunt when she said she knew the appellant as her lover, not as a minor.
4. The state did not file any grounds of opposition or submissions.
 5. This is the first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.
 6. An offence of defilement is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator and
 - c. The victim must be below eighteen years old.
 7. These are the ingredients the prosecution must prove beyond a reasonable doubt before the trial court.
 8. C.G.M. (PW1), in her testimony, said she was born on the 30th day of March 2005. The copy of the Certificate of Birth (P Exhibit 2) confirmed this fact. As of February 24, 2020, she was 14 years and 11 months old. Section 8 (3) of the [Sexual Offences Act](#) provides:

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.
 9. The complainant's age was proven to the required standards.
 10. When C.G.M. was examined by Dr. Alex Mwaura (PW3) on February 28, 2020, he found that she had a broken hymen with rough edges. This informed him that she had lost her virginity within a couple of months.
 11. The element of penetration and the perpetrator were proved.
 12. The complainant testified that the appellant defiled her three consecutive days. The offences took the same pattern, except on the 26th day of February. Her evidence was that when she returned home from school at about 5:30 p.m. on February 24, 2020, the appellant found her in the bedroom while she was changing clothes. He was armed with a knife. He held her by the hand and asked her to accompany him to his bedroom. He pushed her into his house, and upon arrival, he ordered her to undress. He threatened her with death if she raised any alarm. After defiling her, he asked her to go back to their house. She went naked.
 13. On the following day at about 5.30 p.m., when she went to answer a knock at the door, she met with the appellant, who was armed with a knife. He ordered her to go to his house, where he defiled her.
 14. The events of February 26, 2020, were slightly different. She had not gone to school because she was unwell. She was home with her aunt. Her aunt was washing utensils at the sink. When she went to pick



up a call outside, the appellant went to the house armed with a knife and told her to go to his house. She complied. He went and defiled her. She returned to their house after her aunt had left.

15. MWM (PW2) is the complainant's aunt. Her evidence of the events of February 26, 2020, was that she was at home with the complainant after she returned from the hospital. She, however, disappeared from the house. She went to her place of work before locating her. The rest of her evidence was hearsay, and Jane, the alleged source of the information, was not called as a witness. This was inadmissible evidence.
16. The narration of the circumstances leading to the alleged defilement ought to have called for caution. The complainant made it appear like there were no other tenants for three consecutive days. The investigating officer should have gone to the scene to establish whether that was the case, especially after reviewing the medical report.
17. Dr. Alex Mwaura (PW3) noted that the complainant had lost her virginity within a couple of months before he examined her on February 28, 2020, two days after the alleged final episode. Interestingly, the doctor pointed out that the complainant had disappeared with a man she knew well on February 24 and 25, 2020. This evidence warranted further investigation by the investigating officer. The Court of Appeal in the case of *Ndungu Kimanyi vs Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

18. The complainant cannot be trusted to tell the truth about who defiled her and when.
19. MWM (PW2), the complainant's aunt, appeared evasive in her testimony. At one point, she denied chasing the complainant away from her house, but later admitted to having done so. She also failed to inspire confidence as a truthful witness. She withheld many facts and concealed herself behind a veil of forgetfulness.
20. Joshua Kimani Muthoni, the appellant, provided an alibi defence. He informed the court that from February 15th to February 28th, he was working in Naivasha. His claim was supported by testimonies from Monica Wambui (DW2) and Peter Mwangi Chege (DW3).
21. When an accused raises an alibi defence, they do not assume any burden to prove that it is the truth. This was stated in the case of *Kiarie vs Republic* [1984] KLR, where the Court of Appeal held:

An alibi raises a specific defence, and an accused person who puts forward an alibi as an answer to a charge does not, in law, thereby assume any burden of proving that answer. It is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

22. The evidence on record did not displace this defence.
23. Based on the analysis of the evidence in the record, it was therefore unsafe to convict the appellant. The conviction is hereby quashed, and the sentence is set aside. The appellant is released unless in lawful custody.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 25TH DAY OF APRIL 2025

KIARIE WAWERU KIARIE



JUDGE

