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Muthengi v Republic (Criminal Appeal E032 of 2024) [2025] KEHC 7947 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E032 OF 2024

EN MAINA, J

MAY 29, 2025

BETWEEN

MESHACK KAVUVI MUTHENGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the judgment by Hon. D.N Sure (PM) in Kangundo Chief Magistrate's Court in Cr. S.O No. E028 of 2021 Delivered on 29th November, 2023)

JUDGMENT

Background

1. The Appellant herein Meshack Kavuvi Muthengi was charged with an offence of Defilement contrary to Section 8(1)(B) of the *Sexual offences Act* No.3 of 2006.
2. The particulars of the offence being that on 30th August 2020 at Kawangware 46 in Dagoretti North Sub-County of Nairobi County intentionally and unlawfully caused his penis to penetrate the vagina of JWM a child aged 14 years.
3. In the Alternative Charge it was alleged that the Appellant committed an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No.3 of 2006 the particulars being that on 30th August 2020 at Kawangware 46 in Dagoretti North Sub-County of Nairobi County intentionally and unlawfully committed an indecent act by causing his penis to come into contact with the vagina of JWM a child of 14 years.
4. After hearing and analyzing the testimonies of the five prosecution witnesses and also the testimony of the appellant, the trial Magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to imprisonment for 17 years.

5. Aggrieved by the Judgment the appellant preferred this appeal which according to the Amended Petition is premised on the following grounds;

    1. That the Learned Magistrate denied the accused person a fair trial when he was not informed of the right to have an advocate, the fiasco of not providing him with one despite the serious charge and failure to furnish him with witness statements to formulate on cross examination.
    2. That the Learned Magistrate failed in law and fact by failing to establish and prove the ingredients of the offence charged to the required standard
    3. That the Learned Magistrate erred in law and fact in failing to consider that he was not positively identified as the perpetrator of the crime charged.
    4. That the Learned Magistrate erred in law and fact in failing to properly evaluate the evidence on record and relied on insufficient contradictions, inconsistencies uncorroborated and incredible evidence hence came to the wrong pronouncement.
    5. That the Learned Magistrate erred in law by convicting the accused person on a defective charge sheet
    6. That the Learned Magistrate erred in law and in fact by failing to subject the complainant to a voire dire examination.
    7. That the Learned Trial Magistrate imposed a sentence of 20 years imprisonment which is manifestly harsh

6. The Appeal was canvassed by way of written submissions.

7. The Appellant submitted that he was not accorded a fair trial and this was by the fact he was not accorded an advocate to represent him and was also not informed of the right to be represented. Under the limb of fair trial, he also contended that he was not provided with witness statements which would have enabled him to adequately prepare for his defense.

8. The Appellant also submitted that the three ingredients required to prove the offence of defilement namely age, penetration and identification were not proven.

9. The appellant also contended that there were inconsistencies with the evidence of the prosecution witnesses which in turn displaced the credibility of those witnesses.

10. The Appellant also took issue with what he described as defective charge sheet in that the particulars of the offence were not properly and clearly spelt out in the charge sheet and also that failure by the complainant to be subjected to a voire dire test was prejudicial to his case.

11. He urged the court to quash his conviction and set aside the sentence

12. For the Respondent it was submitted that the prosecution discharged its burden of proving the offence beyond reasonable doubt; that the three ingredients of the offence of defilement were proved.

13. On the issue of inconsistencies pointed out it was submitted that they were immaterial and could not vitiate the prosecution's case.

14. It is finally submitted that the sentence of twenty years imprisonment was lawful and lenient taking into consideration the age of the complainant and the circumstance of the case.

Determination.

15. I have considered the Appeal, the Trial Court record and the submissions of parties on record.

16. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court stated:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

17. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

18. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(3) of the *Sexual Offences Act*. Section 8 (1) and (3) of the Act provide as follows;

> " A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 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."

19. The elements of defilement are thus age of the victim (must be a minor) and their age for purposes of the sentence, penetration and the positive identification of the accused person as the perpetrator. This was stated in the case of George Opondo Olunga vs. Republic [2016] eKLR.

20. The first element of age was elucidated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think

that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

21. Further, in the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

22. In this case the Child's Birth certificate was produced and it clearly indicated her date of birth was 28th July 2006 and was hence 14 years and 1 month as at the time of the offence thus a child. Section 2 of the *Children Act* defines a child as a person under the age of 18 years. Section 2 of the *Sexual offences Act* defines a child as "has the meaning assigned thereto in the *Children Act*".

23. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

24. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " 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 the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him 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 offense, 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."

25. In the case of DS v Republic [2022] eKLR, the court stated that;

> " Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

26. In this case, the victim PW1 testified that the accused touched her breast on the first day he took her from Tala to Kawangware and that the next day he had sexual intercourse with her and used a condom.

27. Medical evidence tendered by PW5, the clinical officer. On behalf of her colleague who examined the complainant at MSF France, but was not available to testify, revealed that the complainant was seen at the facility on 31st August 2020. According to PW5 whereas PW1's genitalia was normal there, report completed by her colleague proved the complainant had been defiled; that a vaginal swab showed the presence of spermatozoa. In the premises, it is my finding that penetration was proved beyond reasonable doubt.

28. The last ingredient of the offence is identification. The victim testified that sometimes in the month of July 2020 the accused visited the home of her grandmother where she was living; that after serving him tea he asked her grandmother for her hand in marriage but he was told to wait for her to finish school. He took the tea and left. She did not see him again but when he called again her grandmother told her to go visit him in Nairobi and she obliged. They arranged to meet at a place called Tala at 4pm but he arrived at 5pm when they left for Nairobi and arrived there at about 8pm. It is clear from the evidence that if it was not for her brother PW2's quick action the Appellant would have stayed with the victim ostensibly as his wife. PW2 was present when the Appellant took the victim where he was waiting for them with the police. He had earlier communicated with the Appellant on phone. He therefore corroborated the victim's evidence on identification. The victim's grandmother also testified that the Appellant visited her home in August 2020 but stated that the appellant and the victim were known to each other. It is my finding that the complainant having seen the Appellant twice in broad daylight and having spent considerable time with him she positively identified him as the perpetrator of the offence.

29. As regards the issue of contradictions that have been raised by the Appellant, a similar issue was dealt with in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> "with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case".

30. Also, in the case of Joseph Maina Mwangi vs. Republic *CA No. 73 of 1992* (Nairobi) the Court of Appeal held that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

31. The discrepancies highlighted by the Appellant do not go to the credibility of the victim or to the core of the case. This court has subjected the evidence adduced to fresh scrutiny and I am unable to find that the same were material enough to warrant interference with the conviction and the same is upheld.

32. On the issue of the failure to conduct a voire dire examination, which is done a child of tender years so as to determine if they are sufficiently intelligent and if they understand the meaning of an oath in order to justify reception of their evidence sworn or unsworn, was not conducted in this case.

33. The question then is, was PW1 a child of tender years. In the case of FMG v Republic [2022] eKLR the court while citing the case of Maripett Loonkomok vs Republic [2015] eKLR, held that:

> "Voire dire, a latin phrase (verum dicere) for saying "what is true", "what is objectively accurate or honest" has been used in most Commonwealth jurisdictions and in some instances in the United States of America, as "a trial within a trial", a hearing to determine the admissibility of evidence or the competency or qualification of a witness or juror See Duhaime, Lloyd. "Voire Dire definition" Duhaime's Legal Dictionary."

41. It is now trite that a child of tender years is one under the age of 14 years. In the Maripett Case (supra) it was held that:

"Section 19 of the *Oaths and Statutory Declarations Act* is concerned with the reception and admissibility of evidence of a child of tender years. The section starts by declaring that where the child does not, in the opinion of the court understand the nature of an oath, his evidence may nonetheless be received though not given upon oath. But that evidence shall only be received if, again in the opinion of the court the child is possessed of sufficient intelligence to justify the reception of the evidence and also if, the child understands the duty of speaking the truth...The question therefore is, who is a child of tender years? The *Sexual Offences Act* and the *Oaths and Statutory Declarations Act* are silent on this question. However way back in 1959 in the celebrated case of Kibageny Arap Korir v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years. This Court has recently in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in Samuel Warui Karimi v R Criminal Appeal No.16 of 2014 stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honored 14 years remains the correct threshold for voir dire examination..."

42. Section 19 (1) of the Oaths and Statutory Declaration Act is the provision under which voir dire examinations are underpinned to determine the child's understanding of the nature of an oath. The provision states:

"Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the *Criminal Procedure Code* (Cap. 75), shall be deemed to be a deposition within the meaning of that section."

44. Further in the In the Maripett Case (supra) the Court of Appeal held:

"It follows from a long line of decisions that voire dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this court recently found that;

"In appropriate cases where voire dire is not conducted, but there is sufficient independent evidence to support the charge ... the court may still be able to uphold the conviction".

45. The Court of Appeal in the case of Athumani Ali Mwinyi vs Republic Criminal Appeal No. 11 of 2015 stated thus:

"On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voire dire examination. The complainant's

evidence was cogent, she was cross examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the Appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence the offence of defilement of a child was proved from the totality of both the prosecution and defense evidence especially the medical evidence which corroborated the fact of defilement."

46. It is evident from the record that the court did not conduct voire dire examination because it was of the view this was not a child of tender years. This was drawn from the description in the *Children Act* and which the Court of Appeal in the Maripett Case (supra) distinguished. It is however evident from the record that the child understood why she was in court, and gave her testimony cogently. She was cross examined by the accused and her testimony remained coherent and credible. What she told the court was supported by the medical evidence obtained from the physical examination of her body. Clearly there was no prejudice suffered at all by the Appellant. The trial court which had the privilege to observe the demeanor of the complainant formed an opinion that she was telling the truth. This is one the cases where the Maripet Case above set out the exception. The trial court's omission is not sufficient reason to nullify the proceeding."

34. From the evidence adduced there is no doubt that the victim was above 14 years old and a voire dire examination was therefore not mandatory.

35. On the issue of sentence, the Appellant was sentenced to 20 years imprisonment. In Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024) (Judgment) the Supreme Court faulted the Court of Appeal for reducing the sentence imposed on the appellant from 20 years to 15 years for a similar offence under the *Sexual Offences Act* on the ground that the minimum sentences in the Act are constitutional and lawful. I accordingly find that the sentence in this case was also lawful.

36. This appeal is unsuccessful and is thus dismissed. The conviction and sentence of the trial court are upheld.

Orders accordingly.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF MAY 2025.

E N MAINA

JUDGE

IN THE PRESENCE OF:

Miss Kaburu for the State/Respondent.

The Appellant in person.

Geoffrey Court Assistant/Interpreter.