Mutinda v Republic (Criminal Appeal E065 of 2023)
[2025] KEHC 7590 (KLR) (28 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E065 OF 2023

CW GITHUA, J

MAY 28, 2025

BETWEEN

NICHOLAS MUTIE MUTINDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. M. Kinyanjui in Kandara SRM's Court S.O. Case No.59 of 2016 dated 19th December 2017)

JUDGMENT

1. The Appellant, Nicholas Mutie Mutinda was convicted of the offence of defilement Contrary to Section 8 (1) (3) of the *Sexual Offences Act* No.3 of 2006 (hereinafter the Act)

   The particulars were that on 30th November 2016 at Gatanga Sub-County in Murang'a County, the appellant intentionally caused his penis to penetrate the vagina of J.N.W. (Name withheld), a child aged 15 years.

2. Upon conviction, the appellant was sentenced to serve 20 years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

3. In his petition of appeal filed on 3rd May 2023, the appellant relied on nine grounds of appeal which were to a large extent duplicated. In summary, the appellant complained that the learned trial magistrate erred in law and fact by; convicting him on flimsy, inconsistent and fictitious evidence which did not prove his guilt beyond any reasonable doubt; disregarding his defence and failing to find that it raised a reasonable doubt in the prosecutions case entitling him to an acquittal; imposing a mandatory harsh sentence without considering his mitigation and without considering the time he had spent in lawful custody.

4. The appeal was prosecuted by way of written submissions. The appellant filed his written submissions on 26th March 2024 while those of the Respondent were filed on 3rd May 2024.

   Although in his written submissions the appellant expressed his wish to amend his grounds of appeal, he did not make an application for leave to amend his grounds of appeal on the dates he appeared in court either for mention or for hearing of his appeal. The result is that his appeal proceeded for hearing on the basis of the initial grounds of appeal stated in his petition of appeal which are summarized above and not on the grounds introduced in his written submissions. Fortunately, the purported amended grounds of appeal largely related to the initial grounds of appeal which are for this reason also addressed in the appellant's submissions.

5. In his submissions, the appellant urged this court to find that the victim contradicted herself in her evidence and was not a truthful witness. He submitted that the offence of defilement was not proved against him beyond reasonable doubt as the particulars thereof were at variance with the evidence adduced in court; that in her evidence, the victim testified to events of 11th November 2016 and 5th December 2016 and not 30th November 2016 which is the date on which the offence was allegedly committed. He also submitted that vital witnesses were not called in support of the prosecution case.

6. The appeal was opposed by the respondent. In her written submissions, learned prosecution counsel, Ms Muriu supported the trial court's conviction and sentence. In summary, counsel submitted that under Section 143 of the *Evidence Act*, the prosecution had discretion to decide the number of witnesses to call and that through its five witnesses, the prosecution proved the charges preferred against the appellant beyond any reasonable doubt; that variance between the date stated in support of the charge and the evidence adduced in court was an irregularity which was curable under Section 382 of the *Criminal Procedure Code* (CPC).

7. This is a first appeal to this court and I am aware of my duty as the first appellate court which is to exhaustively re-evaluate the evidence presented before the trial court to arrive at my own independent conclusion regarding whether or not the appellant was correctly convicted and sentenced. In executing the above task, I should bear in mind that I neither saw nor heard any of the witnesses who testified before the trial court and give due allowance for that disadvantage. See: Okeno V Republic [1972] EA32.

8. Guided by the above principle, I have considered the rival submissions made by both parties. I have also read and understood the evidence on record as well as the judgement of the trial court. I find that the key issue for my determination is whether the prosecution proved the charge of defilement against the appellant beyond any reasonable doubt.

9. As stated earlier, the prosecution called a total of five witnesses in support of its case. PW1, who was the minor victim, testified after a brief voire dire examination that she had been in a relationship with the appellant who was her neighbour and that on 11th November 2016 and 5th December 2016, the appellant took her to his house and had sexual intercourse with her; that on both occasions, her father who testified as PW2 found her in the appellants house.

10. PW1 recalled that on 11th November 2016, on finding her in the appellant's house, PW2 started beating her up but the appellant intervened and fought him off. On 5th December 2016, a police officer went to the appellants house, arrested both of them and took them to Ithanga Police Post. According to PW1, before the police officer arrived, the appellant threatened to kill her if she reported to the police that he had sexually assaulted her and this is why she lied to the police (PW5) that the appellant had only defiled her on 30th November 2016.

11. In her evidence on further cross- examination, PW1 recalled that the appellant had also defiled her on 8th November 2016 and she had reported this to her parents who took some undisclosed action. She also recalled having reported the alleged defilement on 5th December 2016 to her parents who in turn informed their neighbour.

12. PW2 on his part supported PW1's testimony that he had found her in the appellant's house on the two dates mentioned above. On 5th December 2016, he had received information that PW1 was in the appellant's house. He reported the matter to a village elder who in turn called a police officer (PW4). The village elder accompanied him to the house and he locked it with a padlock from outside to await the arrival of the police. PW4 is the police officer who went to the scene and arrested the appellant and the victim. He handed them over to PW5 P.C. Edwin Juma at Ithanga Police post.

13. According to the evidence of PW5, upon interrogating PW1, she claimed that she had been in a relationship with the appellant since year 2015 but she denied having had sex with him on 5th December 2016 insisting that the only time she recalled having sex with the appellant was on 30th November 2016. He issued her with a P3 form which was filled by PW3, Mr. Job Maingi, a clinical officer at Thika Level 5 Hospital.

14. According to the evidence of PW3, he examined PW1 two days later on 7th December 2016 and found that her hymen was broken. He noted that the injury was two days old.

15. When placed on his defence, the appellant denied having committed the offence and claimed that he was framed by PW2 who had a grudge against him since he (PW2) owed him money whose payment he had aggressively demanded causing PW2 to complain that he had embarrassed him before his wife.

16. In her judgement, the learned trial magistrate correctly appreciated that only PW1's evidence materially linked the appellant to the commission of the offence since she was the only eye witness. That is why she relied on the proviso to Section 124 of the *Evidence Act* which empowers a trial court to convict an accused person charged with a sexual offence on the sole evidence of a minor victim if the court believed that the victim was a truthful witness and recorded reasons for that belief.

17. It is clear from the trial court's judgement that the learned trial magistrate based her conviction of the appellant on Section 124 of the *Evidence Act* because she believed that she was a truthful witness given her age only that she had lied to the police that the offence was committed on 30th November 2016 instead of 11th November and 5th December 2016 due to fear allegedly caused by the appellant's threats on her life if she disclosed to the police the truth.

18. Upon my own independent appraisal of the evidence on record, I am unable to agree with the trial court's finding that PW1 was a truthful witness simply because she was a child aged 15 years and in her view, she had no reason to lie about such a serious matter. In my view, although ideally children are expected to be innocent and truthful about things that happen to them, due to their tender age and delicate minds, they are susceptible to external influences and their evidence should not always be accepted as gospel truth. Their evidence needs to be considered together with all the other evidence on record in order to determine its credibility.

19. Having carefully scrutinized the evidence on record, I find that the evidence adduced by the prosecution witnesses when considered as a whole reveals material contradictions which casted doubts on the credibility of most of the prosecution witnesses including PW1. For instance, PW1 testified that she had been dating the appellant between November 2016 and December 2016 and although the appellant wanted to have a romantic relationship with her, she had refused his overtures. However, according to PW5, when PW1 was presented to him on 5th December 2016, she claimed that she had

been in a relationship with the appellant since the year 2015. Besides the contradiction in the evidence of these two witnesses regarding the period of PW1's relationship with the appellant, I find it strange that a child of 15 years would have been in a position to understand the concept of dating and the difference between dating and a relationship.

20. In addition, PW1 in her evidence in cross- examination stated that besides the alleged defilement on 11th November and 5th December 2016, the appellant had also defiled her on 8th November 2016 in undisclosed circumstances; that she had also reported this to her parents but when PW2 gave his evidence, he did not claim that he had received such a complaint from PW1. He did not also state that PW1 had reported to him the alleged defilement on 5th December 2016.

21. Further, PW1's claim that she had lied to PW5 that the appellant had not defiled her on 5th December 2016 but had only done so on 30th November 2016 out of fear of the appellants alleged threat to kill her if she told the police the truth is in my opinion incredible because she still ended up implicating the appellant with the same offence she had allegedly been threatened against disclosing.

22. It is not lost on me that there is evidence that PW1 was found in the appellants house on 11th November and 5th December 2016 but no evidence was adduced to indicate how long she had stayed in that house before PW2 and PW4 arrived. The village elder who had reported to PW2 about her presence in the appellant's house on 5th December 2016 was for undisclosed reasons not called as a prosecution witness yet he would have shed light on this issue. It is also important to note that according to the evidence of PW2, he did not find the appellant doing anything with PW1 on 11th November 2016 since he admitted that he found her seated on a chair. In my view, the mere fact that PW1 was found in the appellant's house on the aforesaid two dates cannot by itself amount to evidence that the appellant had committed the offence charged.

23. Another contradiction apparent in the prosecution case is found in the evidence of PW1 and PW3. While PW1 insisted that she had engaged in sexual intercourse with the appellant two times in the month of November 2016, PW3 claimed that on examining her on 7th December 2016, he noted that her hymen was broken and that the injury was two days old. If it was indeed true that the appellant had sexually assaulted the victim on 8th and 11th November 2016 about a month prior to PW3's examination, why did PW3's examination reveal an injury related to a broken hymen which was only two days old? This question was not answered in the prosecution case. In any event, as correctly observed by PW3 in his evidence on cross – examination, evidence of a broken hymen by itself is not conclusive evidence of penetration since a hymen can be broken through other means other than penetration.

24. Given the foregoing, it is my considered view that although the prosecution proved two of the essential elements of the offence of defilement, that is, the victim's age and identity of the appellant since these two were not disputed by the defence, I find that the prosecution failed to adduce credible and cogent evidence to prove that the appellant had committed the offence of defilement against the victim by causing penetration of his genital organ into the genital organs of the victim on either of the dates alleged by PW1. The third and crucial element of penetration was not proved to the standard required by the law. The contradictions in the prosecution's case taken in isolation may appear insignificant but taken cumulatively, they affected the credibility and strength of the prosecution case.

25. It is pertinent to note that in this case, the appellant denied having committed the offence. It was therefore the duty of the prosecution to prove his guilt beyond any reasonable doubt. It was not up to the appellant to prove his innocence.

26. In my view, the learned trial magistrate in this case failed to thoroughly interrogate the evidence adduced by the prosecution in its entirety and thereby arrived at the wrong conclusion that the prosecution had proved its case against the appellant beyond any reasonable doubt which was not the case. In my opinion, the contradictions in the prosecution case raised a reasonable doubt whether the appellant had committed the offence on the date stated in the charge sheet or on the dates specified by PW1 or he had been framed with the offence as alleged in his defence. The appellant ought to have been given the benefit of doubt in this case.

27. For the foregoing reasons, I find merit in the appellant's appeal against conviction and it is hereby allowed. His conviction is consequently quashed and his sentence is set aside. He shall be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANGA THIS 28TH MAY 2025.

HON. C. W. GITHUA

JUDGE

In the presence of :

The Appellant

Ms. Muriu for the Respondent

Ms. Susan Waiganjo, Court Assistant