KENYA LAW
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**Mbaya v Republic (Criminal Appeal E046 of 2023) [2025] KEHC 9370 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9370 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CRIMINAL APPEAL E046 OF 2023**

**AK NDUNG'U, J**

**JUNE 26, 2025**

**BETWEEN**

**ERICK MUTHUURI MBAYA ................................................................ APPELLANT**

**AND**

**REPUBLIC ........................................................................................ RESPONDENT**

***(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No 25 of 2020– V Masivo, SRM)***

**JUDGMENT**

1. The Appellant, Erick Muthuuri Mbaya was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that between 8th April and 5th May 2020 at Buuri subcounty in Meru County, intentionally caused his penis to penetrate the vagina of RK a child aged 14 years old. On 16/06/2023, he was sentenced to fifteen (15) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 27/06/2023. The conviction and the sentence are being challenged on the following grounds;
    i. The learned magistrate erred by failing to note that the prosecution did not prove their case beyond reasonable doubt.
    ii. The trial magistrate erred by not appreciating that the complainant gave conflicting evidence.
    iii. The learned magistrate erred by failing to note that there was no proper medical evidence linking him to the commission of the offence.
    iv. The learned magistrate erred by failing to appreciate that age of the complainant was not conclusively proven.

v. The learned magistrate erred by failing to note that his right to a fair trial under Article 50 of the *Constitution* was infringed upon.

vi. The learned magistrate erred by quashing his alibi defence without cogent reasons.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that oral evidence of the victim and medical evidence must corroborate and in absence of corroboration, it means that the case was not proved. That the complainant's evidence that his brother-in-law found her with him and he informed his sister who consequently informed complainant's mother was hearsay evidence as the said sister and brother-in-law were not availed to testify. That the testimony did not tarry with the charge sheet as the charge sheet indicated 8/04/2020 to 05/05/2020 whereas the complainant did not mention any other day apart from 08/04/2020. She did not mention the matter of being married to him as PW2 alleged and did not mention being pregnant and miscarrying.

4. He submitted that PW2 testified that the complainant went missing in the month of February and was brought back home by parent of the man who was harbouring her but she disappeared again and she was informed by the said parents that she was still there hence raising questions as to who the culprit was, who were these parents and why the matter was not reported. PW2 and PW3's evidence did not corroborate on the evidence of the crime scene and when and how he was arrested. The investigating officer did not shed light on why and when he was arrested. That from PW3's evidence, the matter of being defiled was not substantiated. Further, her mother drew a picture of her behaviours and lack of integrity as she had run away from home on several occasions.

5. Further, PW4, the investigating officer could not corroborate PW3's evidence as she was not the initial investigating officer. The medical evidence did not support evidence of a recent penetration and PW3 was not truthful due to her errant behaviour. That the evidence by PW2 and PW3 was that she was sexually active even before the allegation of being defiled by him and it was therefore upon the medical officer to inform the court whether there was evidence of a recent sexual intercourse. He submitted that there was no evidence of recent sexual encounter as there were no spermatozoa or epithelial cells. That the medical officer testified that the forms did not indicate whether the hymen was old or freshly broken and was unable to tell whether the intercourse occurred hence his findings failed to create a nexus to link him to the offence. Additionally, the medical evidence did not corroborate PW3's and PW2's testimony as was held in DS v Republic (2022) eKLR, that testimony of the victim coupled with medical evidence must be sufficient to determine whether penetration occurred. It was essential for medical evidence to indicate when penetration occurred in order for the prosecution to prove their case and if the time of injuries coincided with the material time as alleged. That failure by the doctor to give the age of the injuries resulted to failure to connect him with the alleged offence hence his evidence was worthless. That the doctor also testified that PW3 was pregnant but failed to give the age of pregnancy. Additionally, PW3 was not pregnant when she testified in court and she did not mention that she was pregnant. Her mother also did not mention issue of pregnancy. Further, penetration is not proved through the broken hymen as superior courts have held.

6. He submitted that his defence remained unchallenged and there were no reasons why it was rejected hence he deserved an acquittal as the case was not proved. With respect to sentence, he submitted that the sentences under *Sexual Offences Act* are in conflict with the *Constitution* and that the sentence meted was excessive for a first time offender and he urged the court to reduce his sentence so that he can reunite with his young family.

7. The Respondent's counsel on the other hand submitted that Age was proved through the birth certificate produced as Pexhibit3. Penetration was proved through the complainant's evidence and medical evidence which indicated that there were lacerations on labia minora, hymen broken, a whitish

vaginal discharge and that pregnancy test was positive. Further, PW2 confirmed that the Appellant was involved romantically with the complainant and confirmed that it was not the first time the complainant was at the Appellant's home. PW3 testimony was also solid and consistent and she was clear who defiled her, where and how and her evidence remained unshaken during cross examination. Her evidence coupled with medical evidence was sufficient to prove penetration. Additionally, the trial court complied with Section 124 of the *Evidence Act* as the court stated that the complainant's evidence could be relied upon without corroboration.

8. As to identification, she submitted that the complainant testified how she met the Appellant when she visited her mother at her work place and she knew his sister who was her mother's friend. She testified that he was her boyfriend hence there was no possibility of error in identification. PW2 corroborated PW3 in regards to identification.

9. As to lack of epithelial cells and spermatozoa, she submitted that their absence does not rule out penetration as was held in Alex Chemwotei v Republic (2018) eKLR. That from the medical evidence, there were lacerations on labia minora, a broken hymen and white vaginal discharge which proved that sexual intercourse had taken place. The medical evidence findings that there was penetration was consistent with the complainant's evidence. As to the allegation that medical evidence did not indicate the age of the injury or age of the pregnancy, she submitted that this did not negate the fact that defilement occurred and he was identified as the perpetrator.

10. With respect to Appellant's defence, she submitted that he did not deny committing the offence and did not provide an alternative explanation that would cast doubt into the prosecution's case. Further, DW2 and DW3 were not eye witnesses. That his alibi defence was raised at the defence stage and it was not raised during cross examination of the prosecution's witnesses for it to be tested. That the Appellant did not attempt to give an explanation that would have cast doubt on the prosecution's case but instead, opted to speak about his arrest. As to sentence, she submitted that sentencing is a discretion of the trial court. That the sentence was too lenient as he was sentenced to 15 years instead of 20 years as provided in law.

11. This being the first appellate court, my duty is well spelt out namely; to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

12. A summary of the evidence adduced at the trial court reads as follows.

13. The evidence before the trial court was as follows. PW1, the Appellant's father was stood down upon the application by the prosecutor for reasons that his evidence could not be impartial.

14. PW2, the complainant's mother testified that on 17/02/2020, the complainant went missing and she reported to the police. Later, two parents brought her to her home but she disappeared again. She called the parents who brought her home and they confirmed that she was at their place. She picked her but she went missing again and started a relationship with the Appellant. They got married. She went for her at his house on a date she could not recall. She went to police station and she was assigned 3 police officers and they arrested the complainant and the Appellant. She was taken to hospital on the next day.

15. On cross examination, she confirmed that she found the Appellant with the complainant at 11:00pm. That she was not aware that the complainant asked him to accompany her home after stopping by. That she stayed at his home for two days and it was not the first time she was at his home.

16. PW3, the complainant testified that she met the Appellant when she went to visit her mother at work. She knew the Appellant's sister who was her mother's friend. They started a relationship and on 08/04/2020, he visited his sister's home where she was. They slept together and they had sex and her

vagina and his penis were involved. They spent the night together and, in the morning, the Appellant's brother-in-law found them and he informed Appellant's sister. Her mother was informed and she reported at police station. She could not recall when they were arrested and that she was taken to hospital on the day of their arrest. That this was not the first encounter with him.

17. She testified on cross examination that his sister's husband and children had travelled to his parent's home and he was left in their home. That when her mother went with the police, she was staying with him. That she could not remember whether the police found any of her belongings there.

18. PW4, the investigating officer took over the file from another investigating officer who was on transfer. By the time he was assigned the file, investigations were complete. He produced the investigation diary as Pexhibit3 and birth certificate as Pexhibit1.

19. PW5, the clinical officer produced the P3 and PRC forms as Pexhibit 2a and b respectively on behalf of Joel Mutwiri who was on transfer. He testified that on examination, there was slight laceration on labia minora, the hymen was old broken, she had a whitish per vaginal discharge, no spermatozoa, HIV negative, Syphilis negative.

20. On cross examination, he testified that the forms did not indicate whether the hymen was old or freshly broken and he was unable to tell when the intercourse occurred. The pregnancy test was positive but the age of the pregnancy was not ascertained. He could not confirm whether the complainant miscarried the child.

21. In his unsworn testimony, the Appellant testified that on the material day, he was at home watching news when the complainant visited and asked him to escort her to where she was living. This was at 9:00pm and before he could wear his shoes, he was arrested by the police.

22. DW2 testified that she was the Appellant's wife. The complainant was living with her sister in law. That on that day, she knocked on the door and she requested that she be escorted. Her husband opened the door for her and the police entered.

23. On cross examination, she testified that she visited the day of the Appellant's arrest and she witnessed the incident. That he did not defile her and that she was not an eye witness.

24. DW3 testified that she was staying with the complainant on request by her mother. That she used to find her with boys and she informed her mother who took her back.

25. She testified on cross examination that the complainant was not of good behaviour and that she was not an eye witness.

26. That was the totality of the evidence before the trial court.

27. I have had occasion to consider the evidence taking cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have put into account the applicable law and submissions made including the case law cited.

28. It is trite that for the charge of defilement to stand, the Prosecution must prove the age of the victim (must be a minor), that there must be penetration and a clear identification of the perpetrator. This is provided for under Section 8(1) of the *Sexual Offences Act* No. 3 2006.

29. Having established the ingredients of the charge, the question that this court should therefore determine is whether those ingredients were proved to the required standard.

30. Proof of age is important in a sexual offense. In Kaingu Kasomo vs. Republic, Criminal Appeal No. 504 of 2010 (UR), the Court of Appeal stated that:

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

31. In the present appeal, the complainant's age is not disputed. It was proved through her birth certificate which was produced as Pexhibit1 which shows that she was born on 22/11/2005. The date of the commission of the offence is in April and May of 2020 hence, she was 14 years old at the material time and therefore a child for the purpose of *Sexual Offences Act*.

32. With respect to penetration, the medical evidence is attacked on account that it failed to create a nexus between him and the alleged offence as it failed to indicate the age of the injuries observed to link the Appellant to the offence on the alleged material time. The medical evidence did not support evidence of a recent penetration and PW3 was not truthful due to her errant behaviour. That the evidence by PW2 and PW3 was that she was sexually active even before the allegation of being defiled by him and it was therefore upon the medical officer to inform the court whether there was evidence of a recent sexual intercourse. Further, there was no evidence of recent sexual encounter as there were no spermatozoa or epithelial cells. That the medical officer testified that the forms did not indicate whether the hymen was old or freshly broken and was unable to tell whether the intercourse occurred.

33. The complainant testified that on 08/04/2020, the Appellant visited his sister at his home where she was. They slept together and they had sex. Her vagina and the Appellant's penis were involved. Appellant's brother in law found them in the morning and he reported to his wife and her mother was informed. She reported and they were arrested. This was not their first encounter.

34. PW5, the doctor produced the P3 and PRC forms on behalf of another doctor who was on transfer. He testified that according to the P3 form, there was slight laceration on labia minora, her hymen was broken and she had a whitish per vaginal discharge. The forms did not indicate whether the hymen was old or freshly broken and he was unable to tell when the intercourse occurred.

35. It is noted that the PRC form which indicated that pregnancy was positive was disregarded by the trial court as it involved another minor and not the complainant in this case.

36. The complainant testified on the encounter of 08/04/2020. According to the charge sheet, the date of the alleged offence is indicated as $8^{th}$ April and 05/05/2020. The complainant did not testify to the events of the latter date. The investigation diary produced mentioned two incidences, one being on $11^{th}$ April, 2020 when her mother reported that her daughter was expected to return home on $10^{th}$ after visiting one Gloria but she failed to and she received a message from a boy known as Muthuuri stating that she was safe. The second incident is on 07/05/2020. The investigation diary indicates that he was arrested on 07/05/2020. The police had left the station at 2100hrs on 06/05/2020 accompanied by complainant's mother and returned at 0030 hrs on $7^{th}$.

37. Furthermore, the P3 form was filled on 08/05/2020. PW2 testified that the complainant was taken to hospital a day after the arrest of the Appellant.

38. Contrary to the Appellant's argument, while finding that penetration was proved, the trial court did not rely on the medical evidence alone. The trial court considered the evidence of the complainant and referred to Section 124 of the *Evidence Act* and found that her evidence could be relied on without being

corroborated reasons being that she was firm, in her testimony, she faced the Appellant and identified him as the person who defiled her. That she was able to recall the details of the material night very well and her testimony remained unshaken on cross examination by the Appellant. That he had no reason to doubt her and he found her evidence to be credible and truthful. Further, PW2 corroborated her testimony that she was found living with the Appellant and that the complainant went missing from home and she received information that she was with the Appellant. Additionally, the medical evidence confirmed penetration as labia minora had sight laceration and her hymen was broken.

39. The issue of the failure by the doctor to assess the age of injury on complainant's genetalia is a non-issue. The same applies to lack of spermatozoa or epithelial cells as it is trite law that the absence of medical evidence to support the fact of defilement is not decisive as the fact of defilement can be proved by the oral evidence of a victim or by circumstantial evidence as was held in Kassim Ali v Republic Cr Appeal No. 84 of 2005 (Mombasa)(unreported) thus;

> " the absence of medical evidence to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

40. This is in line with Section 124 of the *Evidence Act* which provides that a trial court can convict on the evidence of the victim of a sexual offence alone provided that the trial court believes or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief.

41. The trial court as seen earlier duly considered the complainant's evidence and found her to be truthful and found further that her evidence alone could be relied on to convict. He further gave his reasons for such belief. I do not fault the trial's court findings on the issue of penetration.

42. As to identification, the Appellant did not deny that he knew the complainant. The complainant stated that they were in a relationship. Her mother confirmed that they were ambushed together by the police and that he was in a relationship with the complainant. She further confirmed that this was not the first encounter. Hence identification was also proved.

43. The Appellant claimed that his defence was dismissed without cogent reasons. The Appellant in his defence testified that he was at home watching news when the complainant visited and asked him to escort her home and before wearing his shoes, he was arrested. DW2 was his wife who testified that the complainant knocked on the door asking to be escorted and the Appellant opened the door and he was arrested. DW3 only testified on complainant's errant behaviour.

44. The trial court while dismissing his defence noted that his alibi defence was raised during the defence case hence it was not put across the prosecution's witnesses to be tested by way of cross examination. Further, he failed to deny committing the offence but opted to talk about his arrest. DW2 and DW3 were not eye witnesses to the event of the material day hence they failed to add value to the Appellant's defence. Further, there was no claim of bad blood to warrant the Appellant being framed.

45. Having considered the prosecution evidence and the defence by the Appellant, it is clear that the Appellant engaged in a consentual sexual relation with the complainant that involved penetrating her genital organ. The complainant was 14 years old at the time hence with no capacity to consent to sex. I find and hold that the prosecution ably proved the case against the Appellant beyond reasonable doubt.

46. With respect to sentence, the Appellant was sentenced to fifteen (15) years imprisonment which was an illegal sentence as the law provides for a sentence of 20 years imprisonment. It is trite law that sentencing is a discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant

considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (Ogolla S/o Owuor v R {1954} EACA 270). The Appellant did not demonstrate any of the above factors.

47. The sentence imposed was illegal as the law provides for a minimum sentence of 20 years. The Supreme Court in Muruautetu 2 and lately in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024). the court stated;

> "We must also reaffirm 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. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
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> 67. This is why, even in the Muruatetu case, this Court was keen to still defer to the Legislature as the proper body mandated to legislate. While the courts have the mandate to interpret the law and where necessary strike out a law for being unconstitutional, this mandate does not extend to legislation or repeal of statutory provisions. In that regard, we echo with approval the words of the High Court in the case of Trusted Society of Human Rights v Attorney-General and others, High Court Petition No 229 of 2012; [2012] eKLR, at paragraphs 63-64 where it held as follows:
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> > "Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuian influence is palpable throughout the foundational document, the *Constitution*, regarding the necessity of separating the Governmental functions. the *Constitution* consciously delegates the sovereign power under it to the three branches of Government and expects that each will carry out those functions assigned to it without interference from the other two."
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> We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.
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> G. Conclusion
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> Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence

> imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

48. The state has not sought enhancement of the sentence and there was no notice of enhancement served on the Appellant which hampers him from addressing the issue in the appeal. I will not disturb the sentence.

49. With the result that the appeal herein lacks merit and is dismissed.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JUNE 2025.**

**A.K. NDUNG'U**

**JUDGE**