Mumbi v Republic (Criminal Appeal E039 of 2024)
[2025] KEHC 9242 (KLR) (Crim) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9242 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL E039 OF 2024

KW KIARIE, J

JUNE 26, 2025

BETWEEN

JOSEPH KARIUKI MUMBI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in the S.O.A. case NO. E027 of 2023 of the Principal Magistrate's Court at Engineer by Hon. E.N. Wanjala-Principal Magistrate)

JUDGMENT

1. Joseph Kariuki Mumbi, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on diverse dates in October 2023 at [Particulars Withheld], Magumu location of South Kinangop Sub County, within Nyandarua County, he intentionally and unlawfully caused his penis to penetrate the vagina of GNM, a child aged sixteen years.

3. The appellant was sentenced to serve twenty years' imprisonment. He was aggrieved and filed this appeal against the conviction and sentence. He raised the following grounds of appeal:

    a. The Hon. Magistrate erred in matters of law and fact in that there was no prima facie case to found a conviction.

    b. The Hon. Magistrate erred in law and fact, as the appellant was prejudiced when the charge sheet was amended and during the defence.

c. The Hon. Magistrate erred in law and fact as the sentence of 20 years awarded was against the provisions of the *Sexual Offences Act* No.3 of 2006 for a 16-year-old girl, as per the charge sheet, which is a sentence of 15 years.

d. The Hon. Magistrate erred in law and fact as the appellant's cogent defence and mitigation were not given due weight and consideration for a fair trial under Articles 47 and 50 of the *Constitution*, making the conviction unsafe.

e. The Hon. Magistrate erred in law and fact, as the sentence awarded was harsh and unfair and did not consider the sentencing policy guidelines.

f. The Hon. Magistrate erred in law and fact, as the appellant's time of two weeks was not factored into the sentence.

4. The state did not file any grounds of opposition and 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 drawn my conclusions, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v 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.

This position was echoed in the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR. Ngugi J. (as he was then) said:

> Going by this definition of defilement... the issues which the court needs to determine...first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child, and finally, whether the penetration was by the Appellant.

7. I will determine if the prosecution proved these ingredients to the required standards.

8. GNM (PW1), the complainant, said she was 16 years old when she testified on the 8th day of January 2024. Her copy of the Certificate of Birth that was produced indicates that she was born on the 18th day of November 2007. As of October 2023, she was one month shy of 16 years. Her age was therefore proven.

9. The medical evidence adduced by Hamida Wanjiru Rajab (PW6) was that when she examined the complainant on the 23rd day of November 2023, she did not observe any lacerations to the genitalia but had an old, broken hymen. She, therefore, concluded that there had been penetration. A broken hymen alone cannot serve as proof of penetration. This was also the view of the Court of Appeal in the case of *P. K.W v Republic* [2012] eKLR. The court observed as follows:

> " 15. In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that the child's hymen had been broken. Was this justified" Is hymen only ruptured by sexual intercourse.

16. Hymen, also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina (sic) with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however, an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it, like the use of tampons, masturbation injury, and medical examinations can also rupture the hymen when a girl engages in vigorous physical activity like horseback riding, bicycle riding, and gymnastics, there can also be a natural tearing of the hymen. See the Canadian case of *The Queen v Manuel Vincent Quintanila* [1999] AB QB 769."

10. The issue of the complainant having an affair with a man became known to her parents on the 22nd of November 2023, when she went out and returned home late. She lied to her mother and said she had gone to the toilet. When her mother threatened to beat her, she said she had gone to the house of the appellant. On that day, she said they did not have sexual intercourse. After her father beat her that evening, she went away. She lied to her mother and said she had spent the night at her aunt N's house. When she was being examined, she informed Hamida Wanjiru Rajab (PW6) that she had been seeing her boyfriend for two months.

11. The complainant was a boarder at [Particulars Withheld] School. This does not appear to be true, for she was in a boarding school.

12. When the complainant told lies severally, it portrayed her as an untruthful witness. The Court of Appeal in the case of Ndungu Kimanyi v 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, raise 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.

13. The proviso to section 124 of the *Evidence Act* states:

> Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offence, 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.

14. The complainant's evidence was not corroborated due to the numerous discrepancies I have highlighted. Consequently, it was unsafe to rely on it for a conviction. The conviction is quashed, and the sentence is set aside. The appellant is released unless otherwise lawfully detained.

DELIVERED AND SIGNED AT NYANDARUA ON THIS 26TH DAY OF JUNE 2025

KIARIE WAWERU KIARIE

JUDGE