Muthee v Republic (Criminal Appeal E063 of 2023)
[2025] KEHC 9097 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9097 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E063 OF 2023

AK NDUNG'U, J

JUNE 26, 2025

BETWEEN

IBRAHIM MUTHEE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No E008 of 2022– A.R Kithinji, CM)

JUDGMENT

1. The Appellant, Ibrahim Muthee' was convicted after trial of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act*, No 3 of 2006. The particulars were that on unknown date and month in the year 2021 and on 27/01/2022 at Riverside area Timau, Buuri West Sub-county of Meru County intentionally caused his penis to penetrate the vagina of E.M a child aged 10 years. On 28/08/2023, he was sentenced to twenty-one (21) years imprisonment.

2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal filed on 01/09/2023. In his submissions, he sought leave of this court to amend earlier filed grounds of appeal. The conviction and the sentence are being challenged on the following grounds;

    i. The learned magistrate erred by failing to note that the case was not proved beyond reasonable doubt.

    ii. The learned magistrate erred by failing to adduce circumstantial evidence during the trial.

    iii. The learned magistrate erred by not recording complainant's demeanour while in examination in chief and appreciating evidence from a child without first warning self on record.

    iv. The learned magistrate erred by failing to note that his rights under Article 24, 29(f), 27(1) and 50(2) of *the Constitution* were infringed upon.

v. The learned magistrate erred by not appreciating that the case was full of disparities, inconsistencies and was uncorroborated.

vi. The learned magistrate erred by failing to note that there was an issue of bad blood between him and the complainant's mother.

3. The appeal was canvassed by way of written submissions. In his written submissions, he argued that age was not proved as the complainant testified that she was ten years old whereas her mother testified that she was 11 years and the court relied on this. That it was clear that the mother could not recall complainant's birthday, when she gave birth, where or any event that could have occurred. That she relied on the age assessment report which shows that she was not sure when the complainant was born. That the prosecution relied on the age assessment report which indicated the complainant's age as 9-10 years. That the issue of contention is what was the complainant's age? Was it 9, 10 or 11? Additionally, the age assessment report was produced by the investigating officer who was not an expert contrary to Section 48 of the *Evidence Act*.

4. With respect to penetration, he submitted that the trial court relied on the complainant's evidence and uncorroborated evidence of PW3. The trial court failed to record the reasons for believing the complainant in line with section 124 of the *Evidence Act* and also failed to record her demeanour during examination in chief contrary to Section 199 of the *Criminal Procedure Code*. That the truthfulness and integrity of the complainant was in question in that she testified that she was 10 years whereas her mother testified that she was 11 years, a fatal discrepancy. She testified that he defiled her severally but she failed to mention the dates. That it beats logic how she could remember the date of the last ordeal and forget the first and subsequent dates which clearly shows that she was coached. That the medical evidence revealed that there were no injuries and the clinician relied on hearsay evidence from the complainant that there was penetration yet she did not deduce the same from his examination. That it seems that her opinion was based on an old broken hymen which has been frowned upon by the superior court.

5. He argued that the prosecution erred by failing to produce circumstantial evidence in line with Section 33 of the *Sexual Offences Act* as the investigating officer did not visit the scene of crime to gather evidence from neighbours and to portray the scene to the court. PW1 testified that a man named Kabaya called out for her and he released her. The said Kabaya was not summoned as he would have been a material witness. That it beats logic how she could have been defiled and sustain no trauma, nobody noted including her friends, teachers and neighbours. The trial court also failed to warn itself on the reception of evidence of a minor and whether she was telling the truth given the fact that children can be influenced by third parties and are susceptible to coaching or coercion from adults. That such warning should be heeded by the court in order to avoid capricious determination of cases and he relied on the case of Jamaica Supreme Court Criminal Appeal No. 53 of 2009 [2014] JMCA. That the complainant was coached due to an existing grudge between her mother and him.

6. He submitted that he was discriminated from equality and equal protection of the law thus contravening Article 27(i) of *the Constitution*. That it was his constitutional right to be accorded a benefit of doubt. That his defence was shunned and the prosecution failed to disprove his defence as provided under section 212 of the *Criminal Procedure Code* therefore, the court absolved the prosecution from the legal burden of rebutting his defence. He submitted that the case was full of inconsistencies as complainant testified that he went and took her to bed and defiled her whereas the mother testified that she had gone to the house to get food for the baby and he held her and took her to bed and defiled her. That her evidence was fraught with lies and he urged the court to disregard her uncorroborated evidence. That the trial court failed to consider his defence of bad blood in that he

had separated with the complainant's mother and she swore to teach him a lesson. The investigating officer had also requested for money which he did not have. The prosecution ought to have called for evidence to rebut his defence which they failed to hence his defence remained unchallenged.

7. On the other hand, the Respondent's counsel submitted that age was sufficiently proved through the age assessment report which indicated that the minor was between 9-10 years at the time which was corroborated by the evidence of the minor and her mother, PW2. That medical evidence was produced in line with section 77 of the *Evidence Act* and the clinician testified that the hymen was old broken and there were no physical injuries. That the complainant was examined days after the incident and the said incident occurred severally therefore, unlikely that there would be any visible injuries on her genetalia at the time of examination. Penetration was also proved by minor's evidence. As to identification, she submitted that it was through recognition and the same was not challenged during cross examination. The Appellant was well known to her as she referred to him as a friend to her mother and therefore, there was no doubt that he was the one who had defiled her. As to contradictions, she submitted that nothing on the record shows any grave contradictions to warrant an acquittal as the contradictions noted by the Appellant as to age was minor and did not change the fact that the complainant was a child. As to infringement of his rights, she submitted that the trial was fairly conducted.

8. 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.

9. To fulfill this duty, it is opportune to recap the evidence adduced at the trial and which was as follows.

10. PW1, the complainant in her sworn testimony testified that she was 10 years old and in (particulars withheld) primary school. That she knew the Appellant who was a friend to her mother and he was living in Timau. She was living with her mother and him in the same house. Her mother used to go to work on Saturdays and she would leave her at home and the Appellant used to get there early. He found her washing dishes and ordered her to remove her clothes. He took her to bed and threatened to kill her. He ordered her to remove skirt and pants and after removing, he did 'tabia mbaya' to her. That he used to insert something in between her legs where she used to urinate. He removed his clothes and removed his thing used to urinate and inserted it in her place. He did it twice on different occasions.

11. That she reported to her mother who told her that she feared being killed by him if she reported. On 27/01/2022, she was sent home for school fees. She met her mother who was going to work and she told her to stay at home. The Appellant went and took her to bed. He removed her clothes and inserted his thing again in her. A man called Kabaya who was outside called her and he released her. She informed her mother and again she said that he will kill them. Her mother reported to Ann who took her to police station and she was referred to hospital where she was treated. The Appellant went to hospital and he was arrested. That he was the only one who did bad manners to her.

12. On cross examination, she testified that she did not inform anybody apart from her mother and she denied being told to frame him. She had known him since 2021 and she was not happy with what he did to her. Her mother did not tell her what to say in court. In January 2021, she was in Timau as well as him. He started by ordering her to remove her clothes and he told her never to tell anybody. She was taken to children's home and has never seen her mom. That sometimes, he used to sleep at their home.

13. PW2, the complainant's mother testified that in January 2022, she found the complainant at home and she informed her that she had been sent home for school fees. She gave her Kshs.40/- and left and when she returned, she found the small child with the Appellant. The complainant returned at 7:00pm and she asked her where she was. She informed her that when she entered the house to get food for the baby, the Appellant held her and took her to bed and had sex with her. She was called by some children

and he released her and she ran away. On the following day, she asked the Appellant and he said it was a lie and Mama Munene took the complainant to police station. She went to police station searching for the complainant but she was arrested and placed in cell for three days. Later, she was told that the Appellant was arrested. That she was living with him as her husband.

14. She testified on cross examination that when she returned home, the complainant was not there but the Appellant was in the house. That there were four houses in the plot and no other person recorded statement. That on 16/12/2021, she slept at Ann's place while he slept with the children alone.

15. PW3, the clinical officer testified that the complainant had been sent home for school fess when her step father defiled her. That there were no physical injuries, genetalia was normal, hymen was broken and all tests were normal. She produced the P3 and PRC forms as Pexhibit 1 and 2 respectively.

16. On cross examination, she testified that the child was taken to hospital on 28/01/2022 and the offence occurred on 27/01/2022.

17. PW4 the investigating officer testified that a case of defilement was reported by members of the public and she took the complainant to hospital where she was examined and it was confirmed that she was defiled. Her age was assessed to be 9-10 years. That while in hospital, the Appellant went and started quarrelling with the ladies accompanying the child. He arrested him. That he was staying with the complainant. She produced the age assessment report as Pexhibit3.

18. On cross examination, she testified that the ladies who took the complainant to hospital were not her parents and did not call them as they relocated.

19. In a sworn statement, the Appellant testified that he married PW2 but parted way in 2008. She returned in 2013 with a child. He took care of them but she later left. That the child was stolen and he reported to the police and he went to take the child but he was attacked. The father took the child away later. That the child did not want to stay with the mother as she wanted to stay with the father. That they fabricated this case. That he parted way with Jonina and she threatened to teach him a lesson. The investigating officer asked for Kshs.100,000/- which he did not have.

20. I have considered the evidence herein. In that journey, I have taken 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, the submissions made including the case law cited. Of determination is whether the prosecution proved its case to the required degree.

21. 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.

22. 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."

23. In the present appeal, the complainant's age is disputed. The Appellant's position is that age was not proved to the required standard on account that the complainant testified that she was 10 years. Her mother testified that she was 11 years. The age assessment report produced by PW4 indicated that she was between 9-10 years. Additionally, the age assessment was produced by PW4 who was not an expert.

24. PW4, the investigating officer produced age assessment report as Pexhibit3. The report was prepared by Dr. Magarai. It is trite law that evidence touching on expert opinion should be tendered by experts as provided under section 48 of the *Evidence Act* and in situations where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar field of expertise and who are familiar with handwritings of the unavailable experts can be called upon to tender such evidence as provided under section 33 of the *Evidence Act* which states that;

> " Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> (a) .....
>
> (b) made in the course of business when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;"

25. Such evidence is admissible and by dint of section 77 (1) of the *Evidence Act*, the evidence is presumed genuine and authentic. The provisions of section 77 of the Act on its own allows a person other than one who prepared a report to produce it provided that the presumption of authenticity is met and if the document is signed by the person who held the office and qualifications which he professed to hold at the time when he signed it. The section provides;

> " 77(1) In criminal proceedings any document purporting to be a report under the handwriting of a Government Analyst, Medical Practitioner or of any Ballistics expert, Document Examiner or Geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> (2) The court may presume the signature of any such document is genuine and that the person signing it or the office and qualifications which he processed to hold at the time when he signed it.
>
> (3) When any report is so used the court may, if it thinks fit, summon the analyst, Ballistics expert, Document Examiner, Medical Practitioner, or Geologist, as the case maybe, and examine him as to the subject matter there of".

26. The condition precedent to the operation of section 77 is provided under section 33 which means that a basis has to be laid before a witness other than the maker of a document can competently tender the evidence.

27. In the instant case, no explanation was tendered as to why the maker could not produce the age assessment report. PW4 was the Investigating Officer and therefore he could not attest to the handwriting of the maker. Even though the Appellant did not object to the production of the Age Assessment Report, in the eyes of the law, it was inadmissible in evidence. It therefore follows that the

age of the complainant could not be proved through the Age Assessment Report which was irregularly produced.

28. However, where the actual age of the victim is not proved, the apparent age of the victim shall suffice. The Court of Appeal in Jackson Mwanzia Musembi v Republic [2017] eKLR quoted with approval its earlier decision in Evans Wamalwa Simiyu vs. R [2016] eKLR and held that:-

> " Consequently, where actual age of a minor is not known, proof of his/her apparent age is sufficient under the *Sexual Offences Act*"

29. Further, in Thomas Mwambu Wenyi v Republic (2017) eKLR the Court of Appeal cited with approval Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000 which held that:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

30. In Evans Wamalwa Simiyu (supra) the Court of Appeal observed that –

> " As to whether the appellant's age fell within 12 and 15 years of age, the evidence was rather obscure. Although the complainant testified that her age was twelve years, she did not explain the source of this information. The Complainant's mother did not offer any useful evidence in this regard as she did not say anything about the complainant's age. This leaves only the evidence of Dr. Mayende who indicated at Part C of the P3 form that the estimated age of the complainant was 12 years. We have anxiously considered the purport of this evidence since the Doctor does not appear to have carried out a specific scientific age assessment. Nevertheless, we do note that under part C of the P3 form the age required is estimated age and under the Children's Act "age" where actual age is not known means apparent age. This means that in the Doctors opinion the apparent age of the complainant from his observation was 12 years. Thus, although the actual age of the minor complainant was not established, the apparent age was established as 12 years."

31. What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, a parent's evidence or a doctor's finding on apparent age would suffice and this applies to the instant case.

32. Besides that, I also note that the court took cognizance of the apparent tender age of the complainant by conducting voire dire examination before taking down her evidence. The complainant stated that she was a class five (5) pupil. Furthermore, the P3 form produced at the hearing indicated that the approximate age of the victim was 10 years. Am satisfied that the age of the complainant was proved to be within the bracket of 10 to 11 years placing her in the bracket of a defilement charge under section 8 (2) of the *Sexual Offences Act*, No 3 of 2006.

33. With respect to penetration, the Appellant submitted that the trial court erred relying on the uncorroborated evidence of PW3. The trial court also failed to record reasons for believing the complainant and also failed to record her demeanour.

34. The complainant explained how the Appellant found her washing dishes and ordered her to remove her skirt and pants and even threatened to kill her. After removing her clothes, he did tabia mbaya to

her. He removed his clothes and removed his thing used to urinate and inserted in her place. That he used to insert something in between her legs where she uses to urinate. He did this twice on different occasions. She narrated that on 27/01/2022, she was sent home for school fees and the Appellant found her and took her to bed. He removed her clothes and inserted his thing again in her. A man by the name Kabaya called her out and the Appellant released her. She testified that on these two occasions, she reported to her mother who informed her that she feared being killed by the Appellant hence they could not report. Her mother told Ann and Ann reported to police station.

35. PW3, the clinical officer examined the complainant and filled the P3 form. She testified that the complainant hymen was old broken, there were no injuries and all lab tests were normal. The victim was examined a day after the last incident.

36. The trial court while finding that penetration was proved stated that it considered the evidence of the complainant and found corroboration in PW3 evidence and the P3 and PRC which indicated that the complainant was defiled.

37. The P3 and PRC forms had no findings that the complainant was defiled. The medical evidence and the clinician who testified did not inform the court whether there was proof of penetration or not.

38. However, 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."

39. This is in line with the proviso to 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 believed, or be satisfied that the victim is telling the truth and secondly, it must record the reasons for such belief. The said section provides;

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 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."

40. To my mind, Section 124 can only be complied with if the reasons are recorded in the proceeding indicating that the court is satisfied that the alleged victim is telling the truth. The court in Robert Wekesa Simiyu v Republic [2019] eKLR held that;

> " There are no strait-jacketed reasons that must be recorded. What matters most is the impression made on the trial magistrate by the overall evidence of the witness. Those are the reasons he must record."

41. I have perused the judgment of the learned magistrate and when he was considering whether penetration was proved and I note he only stated that he considered the complainant's evidence and

found corroboration in PW3's evidence. Nothing more was added as to whether the complainant was truthful or not according to his observation. The trial court had the advantage seeing and hearing the PW1 testify and was in a position to observe her demeanour and make a conclusion on her truthfulness and firmness.

42. Noting that the burden was always on the prosecution to prove penetration, in the absence of other evidence other than that of PW1, and the court having failed to indicate that it believed the complainant to be truthful and reasons for such belief, the conviction is rendered most unsafe. This case must be distinguished from this court's decision in Benson Muchoki Mathenge v Republic Criminal Appeal No E034 OF 2023 (Unreported) where there was corroboration of the evidence of a minor by other independent evidence.

43. In those circumstances, penetration was not proved as the only available evidence was that of PW1 and which was not corroborated, and the though Section 124 of the *Evidence Act* could be invoked the charge herein being a sexual offence, in this particular case, the conditions precedent for its invocation were not met for reasons aforesaid.

44. In light of the above Penetration, a key ingredient of the offence was not proved. I find merit in the appeal. The same is allowed. The Appellant is to be set at liberty forthwith unless otherwise lawfully held under another warrant.

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

A.K. NDUNG'U

JUDGE