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Mutegi v Republic (Criminal Appeal E050 of 2023) [2025] KEHC 9433 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9433 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E050 OF 2023

AK NDUNG'U, J

JUNE 25, 2025

BETWEEN

LINUS MUTUGI MUTEGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original Conviction and Sentence in Nanyuki CM Sexual Offences Case No 85 of 2019 V. Masivo, SRM)

JUDGMENT

1. The Appellant, Linus Mutugi Mutegi 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 15/11/2019 in Kieni East Subcounty within Nyeri County unlawfully and intentionally caused his penis to penetrate the vagina of LNW a child aged 16 years. On 25/07/2023, he was sentenced to nine (9) years imprisonment.
2. Being dissatisfied with the conviction and the sentence, he lodged this appeal vide a petition of appeal dated 07/08/2023 raising the following grounds;
    i. The learned magistrate failed to appreciate that the medical documents admitted as exhibit had no probative value since it lacked medical content in support of the charge thus incapable of being relied upon to sustain a conviction and sentence.
    ii. The learned magistrate erred by putting much reliance on alleged epithelia cells to hold that this was conclusive proof of penetration by the Appellant considering that the minor was sexually active due to an old broken hymen, normal outer genetalia and normal vagina.

iii. The learned magistrate erred by laying emphasis on PW1 evidence whereas she had been sexually active, had presented herself as an adult and had personally ran away from her home and went to Appellant's house thereby arriving at an erroneous decision.

iv. The learned magistrate failed to evaluate the entire evidence that is the oral evidence vis-à-vis documentary evidence and consequently failed to notice the material discrepancies apparent in the evidence of prosecution witnesses thereby arriving at an erroneous decision.

v. The learned magistrate erred convicting and sentencing him whereas there was no sufficient evidence to warrant such decision.

vi. The learned magistrate meted out a sentence which was illegal, null and void hence it ought to be set aside.

3. The appeal was canvassed by way of written submissions. The Appellant's counsel argued that the trial court only commented on PW1's demeanour and not on the truthfulness, honesty and integrity. That the charge sheet indicated that her age was 16 years whereas PW1 testified that she was 17 years old. That she testified that she left her sister's home, paid the motor cycle rider and upon arrival at the Appellant's house, she cooked supper. That these facts were not in her witness statement therefore, the trial court commented wrongly on her demeanour even with the knowledge that she was a person who was exposed to regular sex as she had a child meaning she was exposed to other men and she was not even a student hence highly deceptive.

4. He submitted that PW2's evidence was hearsay and contradictory as she testified that PC Maina informed them that he arrested the Appellant and that he escaped yet on cross examination, she stated it was corporal Muriithi who arrested him. That PW2 testified that she was informed by Mercy that the complainant had run away from home but on cross examination, she testified it was her mother who informed her and PW3 did not corroborate PW2's evidence that the Appellant had escaped after the arrest. That PW4 testified that there was evidence of numerous penetration due to numerous epithelial cells meaning that PW1 was sexually active and DNA was not conducted to prove that it is the Appellant who committed the act with her.

5. He submitted that the prosecution failed to call the Appellant's roommate whom the Appellant stated had a relationship with the complainant and not him and there was no explanation why the roommate was not summoned therefore, he was a victim of a frame up. That since he introduced new matter of his roommate being the culprit, it behoved upon the prosecution to rebut his defence in line with section 212 and 309 of the *Criminal Procedure Code*. Hence, his defence remained uncontroverted. That his defence was treated as an afterthought and no reasons were given by the court why his defence could not be truthful. That DW2 testified that he was diligent and that she refused to give the police a bribe as she knew the Appellant was innocent. DW2 further testified that PW1's family were ready for reconciliation which did not work due to police influence. That she confirmed that PW1 was out of school and that she had a family. That he intended to call another witness but the trial court declined despite giving the court a date when the witness was available which was a violation to his right to fair trial under Article 50(c) (j) (k) of *the Constitution*.

6. That the trial court failed to consider the circumstances surrounding the case in that PW1 visited his roommate on her own accord, that the medical evidence showed that she was sexually active, and that she behaved like an adult by running away from home hence it was not a case of a minor being lured by a sex pest. The trial court was thus obligated to safeguard his interest by invoking Section 8(5) and (6) of the *Sexual Offences Act* and he placed reliance on the case of Kaura Katana Gona vs Republic (2015) eKLR. Further the trial court failed to guide him throughout the trial as the trial court failed

to inform him on the need to adduce and challenge the evidence as provided under Article 50(2)(k) of *the Constitution*. As to the sentence, he submitted that the sentence was harsh and excessive and urged the court to relook into the sentence.

7. In rejoinder, the Respondent's counsel submitted that age was proved through PW1's birth certificate, Pexhibit5, and the fact that she testified that she was 17 years old did not assist the Appellant's case as she was a minor and the moment the birth certificate was produced, all the doubt as to her age became moot. Further, under Section 8(4) of the *Sexual Offences Act*, both 16 years and 17 years lie within the same bracket of punishment. With respect to penetration, she submitted that PW1's evidence left no doubt that penetration had occurred. Additionally, PW4 testified that there was evidence of penetration due to presence of numerous epithelia cells hence penetration was conclusively proved. As to identification, she submitted that PW1 testified that the Appellant was employed by her brother-in-law. Further, the Appellant in his defence while denying the charges testified that PW1 was in a relationship with his roommate which shows that he was well acquainted with her. With respect to PW1's sexual history, she submitted that it was not part of evidence before the trial court and evidence of sexual history is barred by Section 34 of the *Sexual Offences Act*. That PW1 sexual history was irrelevant and it was the Appellant who was on trial and not any other people that may have been involved with her. Further, it did not help the Appellant to argue that the minor was not lured but took herself to his house as a minor could not have given the consent and the relationship between him and PW1 does not diminish his culpability as was held by the Supreme court in R v Joshua Gichuki Mwangi & Others Petition No E018 of 2023.

8. As to discrepancy, she submitted that peripheral discrepancies do not go to the root of the charge and must be viewed with realisation that no two witnesses will perceive and remember the facts the exact same way. As to discrepancy on the arrest and who reported that PW1 was missing and his escape, she submitted that they were not in issue. As to the Appellant's defence, she submitted that the issue of deception was raised for the first time on appeal and hence must fail. That he did not cite PW1 presented herself as an adult during the trial and this was not placed before the trial court for consideration as he denied committing the offence during his defence. With respect to failure by the prosecution to call his roommate, she submitted that this was raised for the first time during his defence and there was no sufficient description of the alleged roommate as he did not mention the name, description and residence. Further, his defence was unsworn hence details of the said roommate could not be obtained through cross examination. That DW2 did not assist his case as she was not with the Appellant during the material dates. Further, she claimed that she was asked to give a bribe but she did not give details as to when the alleged discussion happened and that she testified that she had nothing to proof that the complainant had tried to reconcile with the Appellant as it is the Appellant who informed her. Therefore, her evidence was all hearsay.

9. That his claim on defence under Section 8(5) brought a question as to what was his defence. Is it that he did not commit an offence as per his defence before the trial court or was he deceived as urged in the appeal? Further, he could not benefit from a defence he did not raise. That he referred to PW1 as a liar in his defence but there was no explanation on why PW1 would have any reasons to falsely implicate him as there was no mention of a grudge between him and PW1 or PW1's relatives.

10. That his claim on violation of his constitutional rights were raised for the first time in his submissions contrary to Section 350(2) of the *Criminal Procedure Code* which estops an Appellant from relying on grounds that were not in a petition of appeal. She therefore urged the court to disregard his submissions on violation of his rights. Further, the record shows that at no time did he fail to cross examine the prosecution's witnesses and the court also gave him an opportunity to cross examine the witnesses. As to allegation that he was denied a chance to call his witness, counsel submitted that he delayed

in conclusion of the matter and the court indulged him on several times when he failed to attend court on time. That he had applied to avail his witness on 15/11/2023 which was a delay of 6 months and no reasons were given as to why the witness would only be available 6 months away and not any sooner. Additionally, granting or refusal of an adjournment is prerogative of a trial court and cannot be subject to an appeal and court must balance the rights of an Appellant to those of the complainant as Section 9(b) of the *Victim Protection Act* entitles the complainant to having the trial begin and conclude without unreasonable delay thus, the trial court correctly held that the period he was asking was impracticable.

11. With respect to sentence, it is submitted that sentencing is a discretion of the court which can only be interfered with when there is evidence that the discretion was exercised injudiciously, was manifestly harsh, was illegal or the court considered extrinsic factors or omitted to consider material factors and none of these factors were urged. She submitted that the sentence of 9 years was illegal as the law provides for a minimum sentence of 15 years and she urged the court to enhance the sentence to 15 years as the law provides in line with Section 354(3) (b), *Criminal Procedure Code*.

12. 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.

13. A recap of the evidence is opportune at this stage.

14. The evidence before the trial court was as follows. The complainant testified as PW1. She informed the court that she was 18 years old and was born on 16/01/2003 and that at the material time of the offence, she was 17 years old. She testified that on 14/11/2019, she went to her sister's home in Chaka and on the night of 15th, she went to the Appellant's place who was her friend. They cooked supper and went to sleep and engaged in sexual intercourse. That they had sex only once and the body organs involved were penis and vagina and they did not use protection. She stayed with him for three days and they were arrested on 17/11/2019 at a place where they had gone to watch movies. She testified that she knew the Appellant for a long time as he had been employed by her brother-in-law. She was taken to hospital and she identified the P3 and the PRC forms.

15. On cross examination, she testified that before leaving on 14/11/2019, she talked to him. That he agreed that he will drop her at Chaka and that she did not record in her witness statement that she paid a boda boda rider and did not state in her statement that they cooked.

16. PW2, PW1's sister testified that she was informed by Mercy, her sister that PW1 had ran away from home. On 17th, they discovered her whereabout and they reported to the nyumba kumi elder who referred them to the police. They reported and PC Maina called her and informed her that they arrested PW1 and the Appellant but the Appellant escaped and they were requested to go to the station to confirm the identity of PW1. They found PW1 at the police station and she assisted the police in arresting the Appellant who was arrested at Naromoru stage in her presence. She produced the complainant's birth certificate as Pexhibit5.

17. She testified on cross examination that she was informed by corporal Muriithi that the Appellant had escaped.

18. PW3, the investigating officer testified how the complainant and the Appellant were taken to police station and he interrogated the complainant and then took them to hospital. He visited the scene led by the complainant and the Appellant. He produced the investigation diary as Pexhibit3.

19. PW4, the clinical officer testified that on examination, the external genetalia was normal, hymen was broken, she had a smelly whitish discharge and on high vaginal swab, there were numerous epithelial cells and he concluded that there was evidence of numerous penetration due to numerous epithelial cells. He produced the P3 form as Pexhibit1, PRC as Pehxbit2 and medical notes as Pexhibit4.

20. In his unsworn defence, the Appellant testified that the complainant was a liar and that she had a relationship with his roommate but later on claimed that she was staying with the Appellant which was false. That he investigated and discovered that the complainant delivered a child.

21. DW2, Appellant's former employer testified that the Appellant was a diligent employee and on 18/09/2019, he alerted her that he had finished his work and that he had been arrested with a girl child. That this was false as she had never seen him with a girl child. That she was asked for a bribe but she declined as the Appellant was innocent. Complainant's family asked for reconciliation but failed to avail themselves.

22. On cross examination, she testified that at the material time, she was not with the appellant. That she had no evidence of intended withdrawal and that the Appellant told her what happened.

23. That was the totality of the evidence before the trial court. I have had occasion to consider the evidence as recorded at the trial court. In so doing, I have taken cognizance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the applicable law, the submissions made including case law cited.

24. 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.

25. 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.

26. Proof of age is important in defilement cases. 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."

27. In the present appeal, the complainant testified that she was 17 years old at the time the offence was committed. The charge sheet indicated that the complainant was 16 years old. PW2 produced the complainant's birth certificate which shows that she was born on 16/01/2003. The alleged offence was committed on 15/11/2019 hence she was 16 years and about 10 months old at the time of the commission of the offence and hence a minor for the purpose of *Sexual Offences Act*.

28. On penetration, the trial court found that the same was proved through the minor's testimony which the court stated that she was truthful and firm and also found corroboration in medical evidence.

29. The complainant testified that she visited the Appellant, they cooked, and they engaged in sexual intercourse. She clarified that the organs involved were penis and a vagina and that there was no use of protection. PW2 testified that the complainant went missing and after searching for her, they discovered where she was and they reported and confirmed that the Appellant was arrested together with the complainant. PW4 the clinical officer testified that upon examination, the outer genitalia

was normal, hymen was broken, there was a smelly whitish discharge and that there were numerous epithelial cells and he concluded that there was evidence of penetration due to presence of numerous epithelial cells. His findings were well captured in the P3 and PRC forms which he produced as Pexhibit1 and 2 respectively.

30. The Appellant challenged the fact of penetration on account of the complainant's errant behavior and her sexual history. It is worthy of note that evidence of sexual history is barred by section 34 of the *Sexual Offences Act* and that PW1's sexual history was irrelevant and it was the Appellant who was in trial and not any other people that may have been involved with her. The said section 34(1) states as follows;

> " No evidence as to any previous sexual experience or conduct of any person against or in connection with whom any offence of a sexual nature is alleged to have been committed, other than evidence relating to sexual experience or conduct in respect of the offence which is being tried, shall be adduced, and no question regarding such sexual conduct shall be put to such person, the accused or any other witness at the proceedings pending before a court unless the court has, on application by any party to the proceedings, granted leave to adduce such evidence or to put such questions."

31. Upon a review of the evidence, I note that the medical evidence adduced was not conclusive of the fact of penetration. However, the law is now settled that medical evidence is not the only evidence that can prove penetration in sexual offences. In Kassim Ali Vs- Republic, Mombasa Criminal Appeal No.84 of 2005, the Court of Appeal stated that:

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

32. In this case, whereas the medical evidence was not conclusive, we have the evidence of PW1 who explained how she went to the Appellant's house and they engaged in sexual intercourse. She gave graphic details that the act involved the organs used were the Penis and vagina.

33. This evidence finds circumstantial backing from the evidence of PW1 being found in the Appellant's house in his company.

34. In countering this evidence the accused raised the defence that PW1 was his roommate's friend. The particulars of this friend were not given. The issue was never raised before in cross examination. If this assertion were true, this would have been the defence line persued by the Appellant, not only in the court below but also at the investigation stage whereby he could have led the police to the right suspect. While in law the Appellant had no duty to prove his innocence, the defence he puts up in totally unbelievable taking note of the fact that he never vigorously depended on it before hand. There is again no explanation whatsoever why PW1 wound frame him with the act. The latest attempt by the Appellant to raise a defence under Section 8(5) of the *Sexual offences Act* removes any shred of credence to the entire defence. This defence can only be raised where the Appellant would be admitting the act of penetration and it is not permissible to use it as an alternative defence as this would amount to playing Russian roulette with the criminal justice system.

35. This defence ought to be raised timeously. I associate myself with the holding of Mrima J in Irene Atieno Ochieng V Republic [2017] eKLR where he stated;

> " An accused person who wishes to take advantage of the defence in Section 8(5) and (6) of the *Sexual Offences Act* must lay such a basis during the trial. When such a serious defence is

raised later, more so on appeal, that denies the prosecution the opportunity to interrogate the same by way of cross-examining the accused person and the other witnesses and that visits an injustice to the victim. Further an Appellant who raises such a defence for the first time on appeal, or an accused person who raises it for the first time when placed on defence, runs the risk of the defence being treated as an afterthought and the defence may not be of much assistance to such a party."

36. The clear facts from the evidence are that PW1 took herself to the Appellant's home, she was a minor, they engaged in sexual act that involved penetration.

37. As to identity, the Appellant did not dispute the fact that the complainant knew him. The complainant testified that they were friends and he was working for his brother-in -law. The Appellant in his defence referred to the complainant as a liar and that she had a relationship with his roommate and not him. The trial court while dismissing this line of defence found it to be an afterthought as the same was not put across any of the prosecution's witnesses as they testified. It was raised for the first time during the defence hearing. This court draws the same inference. He did not deny knowing the complainant and therefore, identity was not in dispute.

38. The trial court further considered his defence and the evidence of his witness, DW2. That evidence did not assist his case as she was not an eye witness. Additionally, as submitted by the Respondent's counsel, DW2 could not confirm as to what transpired on 15/11/2019 as she only gave an account of 18/11/2019. This was after the Appellant's arrest and therefore her evidence did not assist his case as rightly held by the trial court. DW2 further testified that the complainant's family asked for reconciliation but failed to avail themselves which also affirms the commission of the alleged offence.

39. not available to the Appellant at this juncture.

40. With respect to discrepancy, the discrepancy the Appellant's counsel noted were with respect as to who informed PW2 that PW1 had disappeared and who informed PW2 that the Appellant had escaped after his arrest.

41. I have noted the submission on contradictions in the prosecution's evidence. It is trite law as set in numerous authorities that 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. (See Erick Onyango Ondeng' v Republic [2014] eKLR, the Court of Appeal cited Twehangane Alfred v Uganda, (Crim. App. No 139 of 2001, [2003] UGCA, 6,).

42. The question would be whether the prosecution's case was riddled with material contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe and that the inconsistencies must be so grave as to lead to a conclusion that the witness was not truthful.

43. In my view, the inconsistencies noted by the Appellant's counsel were minor as they do not go to the root of the charge and they do not affect the substance of the offence.

44. The Appellant's counsel submitted that the Appellant's rights under Article 50(2)(k) of *the Constitution* were violated as the trial court failed to guide him throughout the trial and failed to inform him on the need to adduce and challenge the evidence and that his right under Article 50(c) (j) and (k) were violated as the trial court declined to grant him an opportunity to call another witness, DW3.

45. Article 50(2)(k) of *the Constitution* is about the right to adduce and challenge evidence. On the right to challenge evidence, the record is clear that the Appellant confronted the prosecution's witnesses apart from PW3 and PW4 whom he chose not to cross examine. He cannot, therefore, be heard to say that he was denied an opportunity to challenge his accusers. With regard to adducing evidence, I have noted

from the trial court record that the Appellant, after he was put on his defence, gave unsworn statement, and called one witness. He was, therefore, accorded the right to adduce evidence, after his rights under Section 211 of the *Criminal Procedure Code*, were read to him. He took advantage of that opportunity.

46. With respect to the denial of his right to call DW3, the Appellant testified on 22/03/2023. He sought an adjournment to avail DW2 and the court gave a hearing date of 26/04/2023 and the matter proceeded. He sought another date to avail one more witness and the hearing was set on 19/06/2023. On the said date, he informed the court that his witness will only be available on 15/11/2023. This was opposed by the prosecution's counsel on the ground that the timeline was unreasonable and impracticable and that the adjournment should have been on reasonable terms. In declining his application for adjournment, the trial court perused the trial court record and noted that he had been given enough opportunity to avail his witnesses. The trial court also found that the explanation for non-attendance of his witness was not plausible.

47. The Court of Appeal in F U M v Republic [2015] eKLR while agreeing with the decision of trial court to deny the Appellant an adjournment held thus: -

> " Is there substance in the appellant's criticism against the learned judge that she improperly denied him an adjournment thereby scuttling his chance to mount a defence? We respectfully disagree. An accused person is of course entitled to apply for an adjournment, but the grant of it is not automatic. It is at the discretion of the court, to be exercised upon principle and reason....Taking into consideration what transpired before the trial court as we have set out herein, it seems clear to us that the appellant was simply bent on recalcitrance and had no desire to offer his defence. He was afforded ample opportunity but he sought to obtain an adjournment without making any effort to give any reasonable grounds for it. He did not give the learned judge material upon which she could exercise again her discretion in favour of granting an adjournment. He was given all the opportunity to present his defence and was even implored to do so but he spurned the same and he cannot be heard to complain. Any inconvenience suffered, if at all, was self-authored and the learned Judge cannot be faulted for proceeding as she did.

48. Similarly, Muchemi J in Ann Wangechi Mugo & 4 others v Director of Public Prosecution & 2 others [2020] eKLR held that;

> " It is trite law that the discretion to grant or refuse adjournments is within the ambit of the trial court. It must be borne in mind that an application for adjournment must be supported by reasons that sufficiently explain the absence of an accused person or his advocate in court on the day under review. It is trite law that trial court is under no obligation to grant an adjournment if it is not convinced that the application is supported by good and credible reasons."

49. As noted by the Respondent's counsel, the matter had been adjourned several times on account of the Appellant's doing. No reasons were given by the Appellant as to why his witness could only be available on 15/11/2023. It is therefore my view that the trial court did not err in failing to grant him an adjournment.

50. With respect to sentence, Section 8(4) provides for a sentence of not less than 15 years. The Appellant was sentenced to 9 years which in the view of this court, is an illegal sentence. The trial court while sentencing considered the jurisprudence on mandatory sentences but did not give reasons why he sentenced him to a lesser sentence than what the law provides. The Respondent's counsel urged this court to vary the sentence in line with section 354 (3)(b) of the *Criminal Procedure Code* but no notice

was served upon the Appellant for enhancement of the sentence. This court has the power to enhance the sentence and particularly so informed by the Supreme Court decision 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). Since no notice of enhancement was served, I will let the matter lie.

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

DATED SIGNED AND DELIVERED VIRTUALLY THIS 25 TH DAY OF JUNE 2025.

A.K. NDUNG'U

JUDGE