Mulinge v Republic (Criminal Appeal E053 of 2023)
[2025] KEHC 11656 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11656 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E053 OF 2023

EN MAINA, J

JULY 31, 2025

BETWEEN

BENARD MUTHUI MULINGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment by Hon.M.Otindo (PM) in Machakos Chief Magistrate's Court in Cr. S.O No. E041of 2022 Delivered on 21st September, 2023)

JUDGMENT

Background

1. The Appellant herein Benard Muthui Mulinge was charged with the offence of Defilement contrary to Section 8(1) as read with section 8(2) of the *Sexual offences Act* No.3 of 2006.

2. The particulars of the offence being that on 28th August 2022 at [Particulars Withheld], Kathiani location in Kathiani Sub-County within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of MMM a child aged 6 years.

3. In the Alternative Charge it was alleged that the Appellant committed an indecent Act with a child contrary to Section 11(1) of the *Sexual offences Act* No.3 of 2006 the particulars being that on 28th August 2022 at [Particulars Withheld], Kathiani location in Kathiani Sub-County within Machakos County intentionally and unlawfully touched the vagina of MMM a child aged 6 years with his penis.

4. After hearing and analyzing the testimonies of the four prosecution witnesses and also the testimony of the appellant and his witness, the trial Magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to imprisonment for 40 years.

Appeal:

5. Aggrieved by the Judgment the appellant preferred this appeal which according to the Amended Petition is premised on the following grounds;

    1. That the Learned Magistrate erred in law and in fact in convicting the appellant for defilement in the absence of credible evidence of penetration and identification of perpetrator as required by law thus resulting to a miscarriage of justice.

    2. That the Learned Magistrate erred in law and fact by failing to properly assess the credibility of the unsworn testimony of the child

    3. That the Learned Magistrate erred in law and fact in relying on insufficient and uncorroborated testimony of the child.

    4. That the Learned Magistrate erred in law and fact in failing to properly evaluate the testimony of PW3 the clinical officer,

    5. That the Learned Magistrate erred in law by failing to consider the appellant's plausible defence presented during trial in violation of the right to fair trial under Article 50(2) of *the Constitution* of Kenya thereby resulting to a miscarriage of justice

    6. That the Learned Magistrate erred in law and in fact by imposing a sentence of 40 years imprisonment for the offence of defilement which was harsh and excessive in light of the mitigating factors and the circumstances of the case..

6. The Appeal was canvassed by way of written submissions.

7. The Appellant submitted that the three ingredients required to prove the offence of defilement namely age, penetration and identification were not proven beyond reasonable doubt.

8. The appellant also submitted that the trial court heavily relied on the unsworn testimony of the victim which required careful scrutiny and thus failed to properly assess the credibility of such testimony

9. The appellant also contended that there were inconsistencies with the evidence of the prosecution witnesses which in turn displaced the credibility of those witnesses especially the child's testimony.

10. The appellant took issue with what he described as insufficient corroboration of the child's testimony in that failure by the prosecution to provide adequate corroboration for the unsworn testimony of the child rendered the conviction by the trial court unsafe and a miscarriage of justice.

11. The Appellant also submitted that the trial court failed to properly evaluate PW3's testimony which led to unsafe conviction. He also stated that the trial court judgement failed to provide any substantive analysis of his defence, which if had properly been considered would raise doubt as to his guilt.

12. on sentence he submitted that the sentence of 40 years was harsh and excessive to the circumstances of the alleged offence and the mitigating factors, he urged the court to substitute it with just and lenient sentence

13. He urged the court to quash his conviction and set aside the sentence

14. For the Respondent it was submitted that the prosecution discharged its burden of proving the offence beyond reasonable doubt; that the three ingredients of the offence of defilement were proved.

15. The respondent submitted that the appellant's defence was an afterthought which created no doubt as to his guilt and was only mere denials

16. On the issue of inconsistencies pointed out it was submitted that the child's testimony was credible and consistent which was corroborated by the medical evidence

17. It is finally submitted that the sentence of 40 years was lawful and lenient bearing in mind that the offence attracts life imprisonment.

Determination

18. I have considered the Appeal, the Trial Court record and the submissions of parties on record.

19. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court stated:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

20. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

21. The Appellant herein was found guilty and convicted of the offence of defilement contrary to Section 8(1) as read together with section 8(2) of the *Sexual Offences Act*.

22. Section 8 (1) and (2) of the Act provide as follows;

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

23. The elements of defilement are thus age of the victim (must be a minor), penetration and the proper identification of the perpetrator. This was stated in the case of George Opondo Olunga vs. Republic [2016] eKLR.

24. The first element of age was elucidated by the Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> " ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable."

25. Further, in the case of Fappyton Mutuku Ngui vs. Republic [2012] eKLR it was held that:

> ... That "conclusive" proof of age in cases under *Sexual Offences Act* does not necessarily mean certificate. Such formal documents might be necessary in borderline cases, but other modes of proof of age are available and can be used in other cases.

26. In this case there was no document produced by the prosecution to ascertain the age of the child neither was the child taken for age assessment. The minor stated that she was 7 years old and the clinical officer PW3 stated that the minor was 6 years old. The defence did not take any issue with the minor's age.

27. In the case of Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000 it was held inter alia 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...."

28. The second ingredient is penetration. Penetration is defined under Section 2 of the *Sexual Offences Act* as follows:

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

29. Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other 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 offense, 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."

30. In the case of DS v Republic [2022] eKLR, the court stated that;

> " Penetration is proved through the evidence of the victim corroborated by medical evidence. The testimony of the victim in this case coupled with a medical examination must be

sufficient to determine whether penetration occurred. Where the medical examination may not be available or conclusive, the court ought to weigh with thorough scrutiny and utmost caution, the evidence of the child, in order to determine whether there was penetration."

31. In this case, the victim PW1 testified that she was informed by her neighbors that her grand child the victim herein had been defiled by the appellant . PW2 the minor testified that on 28th August 2022 at 11 am the appellant entered the house, he removed his clothes, removed her clothes, he used hiyo kitu yake and inserted in her private parts and it was painful. She also stated that was the third time the accused was doing the same thing to her

32. Medical evidence By PW3 the clinical officer revealed that PW2's labia majora and minora were lacerated, the hymen was perforated and oozing blood from the vagina. He concluded that the minor had been defiled I find that indeed there was penetration.

33. The last ingredient is identification. It was not in dispute that the appellant was a neighbor to the victim and they were known to each other. I find that identification was positive and thus this ingredient was proved.

34. On the issue of the credibility of the unsworn testimony of a child, The court of appeal in the case of KINYUA V. R [2004] I KLR 256 at page 265 said:-

> " There are two steps to be borne in mind. The first step is for the court to ascertain whether the child understands the nature of an oath. An investigation to this effect must be done by the court immediately the child – witness appears in court. The investigation need not be a long one but it has to be done and has to be directed to the particular question whether the child understands the nature of an oath. If the answer to this question is in the affirmative, then, the court proceeds to swear or affirm the child and to take his or her evidence upon oath. On the other hand, if the child – witness does not understand the nature of an oath, he or she is not necessarily disqualified from giving evidence. The second step then follows. The court may still receive his evidence if the court is satisfied, upon investigation, that he is possessed of sufficient intelligence and understands the duty of speaking the truth. Again investigation in this respect need not be a long one but it must be done and when done, it must appear on record. Some basic but elementary questions may be asked of the child to assess the level of his intelligence and whether he understands the duty of speaking the truth or otherwise. Where the court is so satisfied, then, the court will proceed to record unsworn evidence from the child – witness"

35. In this case, the court took the child through a voire dire examination where the court then noted that the child was knowledgeable enough to testify but would however give unsworn testimony as she did not understand what an oath was. The appellant majorly seemed to raise the issue of credibility of the victim's testimony based on her inaccuracy in dates which do not appear fatal at all to the case.

36. As regards the issue of contradictions that have been raised by the Appellant, the way to treat contradictions in a case was stated by the Court of Appeal in Jackson Mwanzia Musembi v Republic (2017) eKLR where the court cited with approval the Ugandan case of Twahangane Alfred –Vs- Uganda CR. Appeal No. 139 of 2002 (2003) UGCA,6 where it was held that:

> " with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. 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".

37. Also, in the case of Joseph Maina Mwangi vs. Republic CA No. 73 of 1992 (Nairobi) the Court of Appeal held that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the working of Section 382 of the Criminal Procedure Code, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

38. The discrepancies highlighted by the Appellant have been noted but they do not go to the core of the offence before the court. This court has subjected the evidence adduced to fresh scrutiny and though it is true that there were inconsistencies in the evidence of the said witnesses, I am unable to find that the same were material enough to warrant interference with the conviction and the same is upheld.

39. On the issue of PW3's testimony he testified that he examined the child and concluded that she had been defiled. He produced the p3 form and the PRC form and also noted that there was no proof of age of the minor. I do not find any inconsistency in his evidence which the court should have taken note of.

40. The appellant in his sworn testimony stated that on the alleged day of the offence he was at home doing bricks for building a house. He said he did not commit the offence and the witnesses were out to destroy his life. He called his mother as a witness who testified that on the day of the alleged offence her son was at home doing bricks when a social worker called her and told her two people had told her that the appellant had defiled their daughter.

41. The appellant submitted that if his defence had properly been considered it would have raised significant reasonable doubt as to his guilt. The trial court indeed considered the alibi defence of the appellant and stated that it was full of generalities not sufficient to remove him from the scene of the crime.

42. In the case of Thomas Mwambu Wenyi v Republic [2017] KECA 756 (KLR) it was observed that:

> The first appellate court had this to say about the appellant's defence.
>
> "24. On the issue of the appellants defence, I agree with the submissions by Miss Mandu that the same was considered by the trial magistrate as follows:-
>
> "If indeed there was a grudge between the father of PW1 and himself what mature would PW4 Micheline Mwaria neighbor have for stating she saw him washing clothes that morning outside his house at about 11.00am. And also stating that she saw PW1 leaving his house."
>
> The observations made above and reflection on the record by the 1st appellate court of how the trial court evaluated the appellants defence is a clear indication that the two courts below analyzed the appellant's defence and weighed it against the prosecution's evidence and found it ousted for the reasons given by each court in their respective judgments. We are therefore satisfied that no burden of proof was shifted to the appellant by the two courts below as claimed by the appellant.

43. From the evidence adduced there is no doubt that the victim was defiled by the appellant thus the prosecution proved its case beyond reasonable doubt.

44. On the issue of sentence, the Appellant was sentenced to 40 years imprisonment. Section 8(2) of the *Sexual Offences Act* provides A person who commits an offence of defilement with a child aged eleven

years or less shall upon conviction be sentenced to imprisonment for life. The complainant in this case was six years old and the sentence imposed was less than the minimum prescribed by the law but there is no cross -appeal this court shall not interfere.

45. In Petition No. E018 of 2023 Republic v Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition 18 of 2023) [2024] KESC 34 (KLR) 12th July 2024) (Judgment) the apex court in overturning the Court of Appeal's judgement where the judges had reduced the sentence stated as follows:-

> " i. Judges of the Court of Appeal acted ultra vires and without jurisdiction by assuming original jurisdiction on constitutional matters which were not raised at the High Court while canvassing the minimum mandatory sentences question; i.In departing from the decision on minimum mandatory sentences for sexual offences as stated in Muruatetu & another v Republic S.C Petition 15 & 16 of 2015) [2021] KESC 31 (KLR)(Muruatetu directions) the learned judges of the Court of Appeal violated the principles of stare decisis and proceeded to determine that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*"

Disposition

1. This appeal is not merited. It is dismissed. The conviction and sentence of the lower court are upheld.

2. Right of Appeal to the Court of Appeal is explained to the Appellant.

JUDGMENT SIGNED, DATED AND DELIVERED ON THIS 31ST JULY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Nyauncho for the state

The appellant

Miriam- court assistant/Interpreter