



REPUBLIC OF KENYA



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**Mbuvi v Republic (Criminal Appeal E020 of 2023)
[2025] KEHC 11595 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11595 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CRIMINAL APPEAL E020 OF 2023**

RL KORIR, J

JULY 30, 2025

BETWEEN

NICODEMUS KITHUKU MBUVI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from original conviction and sentence in Criminal
Case No. SO E027 of 2023 delivered by HON. J.M. GACHERU (Resident
Magistrate) on 20th November, 2023 at Marimanti Law Courts.)*

JUDGMENT

1. Nicodemus Kithuku Mbuvi (Appellant) was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars were that on diverse dates between 14th February, 2021 and 9th August, 2021 at [Particulars Withheld], Gatunga Sub-Location, Gatwe Location, Tharaka North Sub-County within Tharaka Nithi County, intentionally caused his penis to Penetrate the vagina of C.M a child aged 16 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(i) of the *Sexual Offences Act*. The Appellant was tried, convicted and sentenced to serve 15 years' imprisonment by Hon. Gacheru (RM).
3. Aggrieved by the conviction and sentence, the Appellant filed the present Appeal. In his undated home made Petition of Appeal, the Appellant raised eight grounds which can be summarized and paraphrased into four as follows:-
 - i. That the Prosecution's case was not proved beyond reasonable doubt;
 - ii. That the trial court did not consider the Accused defence.



- iii. That the trial magistrate failed to order DNA under Section 36(1) to link him to the offence and;
 - iv. That the trial magistrate failed to record reasons for believing the testimony of the sole complainant.
4. This Appeal was canvassed through written submissions which I have considered.
 5. My duty as a first appellate Court is to carefully examine and evaluate the evidence which was presented before the trial court and come up with my own independent decision.

This duty was aptly explained in the case of *Kiilu & Another-v- Republic* (2005) 1 KLR 174 where the Court of Appeal held:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weight conflicting evidence and draw its own conclusions.

It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses.”

6. The evidence before the trial Court was that the Appellant whose age was not disclosed entered into a sexual relationship with the complainant named C.N who was then aged 16 years and therefore a minor. CM (PW1) who was the victim of the offence testified that she met the Accused in January 2021 after she completed class 8 at R.P.S School and he asked her to be his girlfriend. That they continued communicating and on 14th February 2021 he invited her to his place at Gatunga and she went to his house at around 11.00 a.m where they talked and had sexual intercourse.
7. PW1 further testified that in March 2021 her mother discovered that she had a phone and upon being interrogated she ran away from home to her aunt’s home. In June 2021 her mother went for her and instead of going back home she ran away to the Appellant’s house as she was pregnant with his baby. That the Appellant acknowledged that he was the father of her unborn child and they started living together as husband and wife till August 2021 when her mother visited them and told them that the Chief wanted to see them. That they went to the Sub-Chief’s office where they found the Chief and the Sub-Chief who interrogated them and the Accused admitted that he was the father of the unborn child and also undertook to take care of her and the child. That they were both arrested and taken to Nkondi Police Post and then to Marimanti Police Station. PW1 said that she was taken to Marimanti Level 4 hospital where an ultra sound (MF11) was done and a P3 Form (MF12) filed.
8. IKM (PW2) was the mother of the complainant. Her testimony was that she found out that her daughter had a phone and on inquiring where she got it, she refused to surrender it and instead ran away to her aunt’s home when she (PW2) disciplined her.
9. PW2 stated that in the month of June when she was preparing to take her to Form one, she found out that she was pregnant and when asked who was responsible she said that it was Nicodemus. That she asked her to take her to his place and she went and confronted him then reported to the Chief. That at the Chief’s Office, the Appellant admitted to have impregnated her daughter and promised that he would take care of her. PW2 further stated that her daughter gave birth to a child named Elijah Mbuvi



and that the second name belongs to the Accused. She stated that her daughter was impregnated at 17 years. She identified the Birth Certificate MF1-3 Serial No. XXXXXX.

10. Senior Chief David Kithaka Mukembo of Nkondi location (PW3) testified that he received a report from his Assistant Chief that a school going girl had been subjected to early marriage. He went to the Assistant Chief's office and found PW1 (victim), PW2 (the mother) and the Accused. That upon interrogating the Accused, he stated that PW1 was his wife and that PW1 informed him that she was pregnant. That he arrested the Accused and escorted him to the Police Post.
11. In cross-examination, the Chief stated that he acted to protect the child and that the case was not a fabrication to fix the Accused whom he did not know before that date.
12. Lilian Wahu (PW4) was the Clinical Officer from Marimanti Level 4 hospital where PW1 was examined and a P3 Form filled by her professional colleague Kenneth Mutwiri on whose behalf she was testifying. She stated that the victim was seen at the facility on 12th August 2024 and she had no complaints. That the victim only stated that she had had intercourse with a person well known to her and she was pregnant. The pregnancy was confirmed by ultra sound examination to be 7 months, 2 days or 28 weeks and 2 days with an expected date of delivery being 31st October 2021. PW4 produced the ultra sound report and P3 Form as P. Exhibit 1 and 2 respectively.
13. No. 110617 PC Amos Wakhungu of Nkondi Police Station (PW5) was the Investigating Officer. He testified that on 9th August, 2021 he received the area Chief together with Irene Kathina (PW2) the victim (PW1) and Nicodemus Mbuvi at the station. He testified that he interrogated the Accused and the complainant and his interrogation revealed that the Accused had married the complainant who was underage. That he took the statements of the witnesses, re-arrested the Accused and escorted the complainant to Marimanti Level 4 hospital where her P3 Form was filled.
14. PW5 produced a copy of the complainant's Birth Certificate as P.Exhibit 3. He explained that the mother of the complainant had not co-operated to give the original.

The Defence Case

15. The court found a prima facie case against the Accused. Put on his defence, the Accused testified that the complainant went to his office in Gatunga in January 2021 seeking a loan but she did not qualify for it. That in August 2021 while at his office at Gatunga, he received a call from the Chief who instructed him to go to Chief's Office. That when he got there he found the complainant and her mother and he was arrested. He denied having met PW1 on 14th February 2021. DW1 also said that PW1 stated that she was 16 years while her mother (PW2) stated that she was 17 and that there was no proof that PW1 was a student. He alleged that the case was a fabrication.
16. In cross-examination DW1 insisted that the case was a fabrication. He however admitted that he met PW1 in January 2021 while working as an auditor in Jirani Smart, a Financial Institution in Gatunga. He stated that he interacted with PW1 although he was not a Loans officer.
17. As earlier stated, the trial court in its Judgment dated 20th November 2023 convicted the Accused and sentenced him to serve 15 years' imprisonment.

Submissions

18. In submissions dated 21st May 2024, the Appellant submitted that the case was not proved to the required legal standard. The body of his submissions however amount to an admission of the offence.



19. The Respondent's submissions are dated 29th October, 2024. The gist of the Respondent's submissions is that the Prosecution proved its case beyond reasonable doubt.
20. I have considered the evidence that was laid before the trial court, grounds of appeal, and the respective submissions. The main issue for my determination is whether the offence was proved to the required legal standard. This is intrinsically linked to prove of the ingredients of the offence being:-
 - i. proof of age of the complainant,
 - ii. proof of penetration and,
 - iii. the positive identification of the perpetrator.

Identification of the Perpetrator

21. I begin my analysis with the identification of the Appellant. There was credible testimony from the victim (PW1) that she met the Appellant in January 2021 at Gatunga and he asked her to be his girlfriend. They communicated with her until her mother discovered in the month of March that she had a phone. When she was asked about it, she said she had bought it and ran away to her aunt's place where she stayed until the mother went for her.
22. It was while at her aunt's house that the pregnancy was discovered and when interrogated, she told the mother that the Appellant was responsible. According to her mother (PW2) the complainant ran away to live with the Accused between June and August 2021. When called to the Chief's office, the complainant and the Appellant showed up together and upon interrogation, the Appellant told the Chief (PW3) that the complainant was his wife, and he was arrested for marrying an underage girl.
23. I find the identifying evidence overwhelming. The Complainant and the Appellant were in a sexual relationship which even led to a pregnancy. My take is that the illicit phone which the Complainant was found with must have been given to her by the Appellant. This is because she had just completed class 8 and her mother said that she had sold her cow to take her to school, meaning that the Complainant could not have had the luxury of affording a mobile phone.
24. At the meeting in the Chief's office, PW3 testified that the Appellant admitted that he was the father of the unborn child and was willing to take care of the complainant and the child.
25. The Appellant made an about turn in court when he denied knowing the complainant. He stated that the case was a fabrication. Cross-examined, he admitted having met PW1 in his office in Gatunga. He however denied having cohabited with the complainant.
26. My consideration of the evidence leads me to the conclusion that the Appellant's defence was false. It was also incoherent. On the one hand, he denied knowledge of the Complainant and on another he admitted having met her. His defence did not cast doubt on the evidence of the complainant, her mother (PW2), and the Chief (PW3) whose Summons to the Chief's office, he responded to willingly.
27. Further, in this Appeal, the Appellant departed from his grounds of appeal that the case was not proved and that he was not identified. He submitted that "there was no dispute whatsoever between the accused, the complainant and the mother, so the matter in this case was forced by the Chief and the administration to go and give false allegation against the accused person. Before the conviction and sentence the two used, (that is the complainant and the accused) to live together like husband and wife and were blessed with a baby boy who was named Kivuva the name of the accused father. (sic)"
28. It is my finding that the identification of the Appellant as the perpetrator was proved beyond reasonable doubt.



Proof of Penetration

29. The above submission was a departure from the Grounds of Appeal and an admission that he was indeed the perpetrator thereby lending credence to the Prosecution evidence of identification which I have already found solid.
30. With respect to penetration, the Appellant raised the ground that he was not subjected to DNA to establish that he was the father of the complainant's baby. As I have already observed, he abandoned this line and submitted that the child was his and was even named after his own father in accordance with his community's tradition. I will therefore not belabor this Ground of Appeal. Suffice to state that the legal position is that while pregnancy would pre-suppose penetration, the act of penetration is not proved by pregnancy but through the evidence of the victim corroborated by medical evidence. See *George Opondo Olunga Vs. Republic* 2016 eKLR.
31. I have however evaluated the evidence before the trial court. The Complainant (PW1) testified how she met the Appellant who asked her to be his girlfriend. Her act of visiting him in his house where they ended up having sex shows that she acceded to his request. She became pregnant and ran away from home to live with him. Upon her mother's intervention, she was taken for medical examination and the pregnancy was confirmed. The Clinical Officer (PW4) produced the medical evidence which concluded that the pregnancy was a result of the penetration.
32. The fact of penetration was therefore proven beyond reasonable doubt.

Age of the Victim

33. I have chosen to consider the age of the complainant last for reason that it was most contested.
34. The importance of proving the age of the victim was stated by the Court of Appeal in *Hadson Ali Mwachongo vs. Republic* [2016] eKLR thus:-

“The importance of proving the age of a victim of defilement under the *Sexual Offences Act* by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In *Alfayo Gombe Okello vs. Republic* Criminal Appeal No.203 of 2009 (Kisumu). This Court stated as follows:-

‘.....In its wisdom Parliament chose to categorize the gravity of that offence on the basis of the age of the victim and consequently the age of the victim is necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8(1).’
35. Rule 4 of the Sexual Offences Rules, 2014 provides that:-

“When determining the age of a person, the court may take into account evidence of the age of that person that may be contained in a Birth Certificate, any school documents or in a baptismal card or similar documents.”
36. PW1 testified that she was 16 years old and still in school when she met the Accused. That she went to live with the Accused in June 2021 until August 2021 when they were arrested. That they lived as husband and wife and got a son named Elijah Mbuvi. PW1's mother (PW2) on the other hand testified that PW1 was 17 years old when she was impregnated. She showed the court the Birth Certificate S/ No. 65167 (MF1 1) and stated the indicated date of birth as 21st December, 2004.



37. A copy of the Birth Certificate (MF13) was produced by the Investigating Officer (PW5) as P. Exhibit 3. PW5 told the Court that he was producing a copy because the complainant's mother did not cooperate and refused to give him the Birth Certificate.
38. The Investigating Officer's statement that the Complainant's mother withheld the original Birth Certificate and refused to have it produced in court as an exhibit raises questions as to the authenticity of the Birth Certificate. Why did she withhold it? and Where did the Investigating Officer get the copy?
39. I have looked at the proceedings of 12th January, 2023 when PW2 the Complainant's mother testified. She stated as follows. "My daughter gave birth to Elijah Mbuvi. The second name belongs to the Accused. When my daughter was impregnated, she was 17 years' old. This is her Birth Certificate. Date of Birth is 21st December, 2004 for Caroline Makena."
- The court proceeded to state in the proceedings "MF1-3 Birth Certificate."
40. I have looked at the copy of the Birth Certificate in the trial file. It does not contain any marking of the court. There is no indication that it was marked MF1-3 or P.Exhibit 3. Besides that, it is barely legible and the mother's name is different from that in the proceedings.
41. This leaves doubt in the mind of the court as to whether the copy of the Birth Certificate was the true copy of the Complainant's Birth Certificate. Since this was the document relied upon to prove the age of the Complainant, the omission to provide an authenticated copy puts the evidence of the age of the Complainant in doubt. Such doubt is heightened by PW2's refusal to produce the original Birth Certificate for the court to look at.
42. It is my finding therefore that the evidence presented before the trial court created deep suspicion that the Complainant was under age. However, as doubt surrounded the evidence on the age of the complainant, the charge was not proven to the required legal standard. As the law demands, the benefit of the doubt must go to the accused.
43. In the final analysis, I quash the conviction and set aside the sentence.
44. The Appellant is set at liberty unless otherwise lawfully held.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 30TH DAY OF JULY, 2025.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Ms Rukunga for the Respondent, and Muriuki Court Assistant.

