

KENYA / JUDGMENT

Mutwiri v Republic [2026] KECA 123 (KLR)

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COURT

Court of Appeal

BEFORE

K M'Inoti, PM Gachoka

CASE / FILE NUMBER

Criminal Appeal 108 of 2020

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Mutwiri v Republic (Criminal Appeal 108 of 2020) [2026] KECA 123 (KLR) (30 January 2026)
(Judgment)

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[2026] KECA 123 (KLR)

Republic of Kenya

In the Court of Appeal at Nyeri

Criminal Appeal 108 of 2020

K M'Inoti & PM Gachoka, JJA

January 30, 2026

Between

Benson Mutwiri

Appellant

and

Republic

Respondent

(Appeal from the judgment of the High Court of Kenya at Meru (Majanja, J.) dated 30th May 2018
in HCCR.A. No. 142 OF 2017

Criminal Appeal 142 of 2017

)

Judgment

- 1.This is the appellant's (Benson Mutwiri's) second appeal after the High Court of Kenya at Meru (Majanja, J.), dismissed his first appeal on 30th May 2018. The first appeal arose from appellant's conviction and sentence to life imprisonment by the Chief Magistrate's Court at Meru for the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, 2006. In the trial court, one magistrate heard the prosecution's case and a succeeding one heard the defence and rendered the judgment pursuant to section 200 of the Criminal Procedure Code, after the appellant requested the trial to proceed from where the first magistrate had left.
- 2.The particulars of the offence for which the appellant was convicted alleged that on 16th July 2014, at Kibithe Village, Ntugi Location, Meru County, he defiled JGM, a girl aged 9 years old. There was an alternative charge of committing an indecent act with a child contrary to section 11 of the Sexual Offences Act, the particulars being that on the same date and at the same place as in the main charge, the appellant touched JGM's vagina. After convicting the appellant on the main count, the trial court did not make any findings on the alternative count which has not been an issue in either the first appellate court or in this Court.
- 3.The prosecution case against the appellant was constructed around the evidence of four witnesses. The gist of that evidence was that on the material day, JGM (PW1), a standard 3 pupil, was returning home from school in the afternoon when she encountered the appellant fetching water. The appellant grabbed her, covered her mouth with his hand and dragged her to a nearby thicket, where he defiled her and thereafter threatened her with consequences if she divulged to anyone what had happened.
- 4.Upon getting home, JGM did not inform her mother (PW2) what had happened. However, the next morning as the mother prepared JGM for school, she noticed blood on her pyjamas and on checking, realised that she was bleeding from her vagina. That is when JGM told the father and the mother what had happened to her the previous day and the threats the appellant had issued.
- 5.JGM was taken to Kiirua Mission Hospital that day, but she could not be attended to due to the large number of patients. Ultimately, she was examined by a doctor on 18th June 2014 and the defilement was reported to the police, who issued a P3 Form that was filled at Meru hospital. The medical evidence, adduced by Dr. Mohammed Noor (PW3), indicated that JGM had sustained lacerations and tears in her vagina; that her hymen was broken; and that she was infected. The injuries were six days old.
- 6.JGM's age of 9 years was proved by a birth certificate. As for the identity of the perpetrator, it was JGM's evidence that although she did not know the appellant's name, she had been seeing him fetching water from a tank near her school. PC Mwaura (PW4), arrested the appellant after he was identified by JGM. He visited the locus in quo and confirmed the presence of the water tank and the thicket where JGM had been defiled.

7. When he was put on his defence, the appellant gave an unsworn statement and denied having committed the offence. He stated that his name was not Benson Mutwiri, but Benson Mutwiri Mbaabu and that there was a coincidence in the names, leading to mistaken identity.

8. After unsuccessfully challenging the conviction and sentence in the High Court, the appellant is before this Court where he challenges the judgment of the High Court on the grounds that it erred by relying on the inconsistent evidence of a single eyewitness; by relying on unreliable identification; by failing to find that there was no medical or DNA evidence linking him to the offence or JGM's infection; by ignoring the fact that there were no exhibits connecting him to the offence; and by failing to consider his defence.

9. The appellant prosecuted the appeal on the basis of written submissions dated 13th August 2025. On his identification, he submitted that it was not reliable because it was by a single eyewitness. He added that JGM was alone at the time of the incident and that it was her evidence that she did not know his name. He submitted that he was prosecuted because of mistaken identity and that JGM did not give any description of the perpetrator of the offence to the police. It was also his contention that no identification parade was held for purposes of proper identification. He maintained that his identification was dock identification, which was worthless. In support he cited *Gabriel Kamau Njoroge v. Republic* [1987] KECA 4 (KLR) and *James Tinega Omwenga v. Republic* [2014] KECA 670 (KLR).

10. Next, the appellant submitted that there was a contradiction in the prosecution evidence regarding when the offence was reported to the police and his arrest, with PW2 stating in one breath that the offence was reported on 20th July 2014 and in another that it was 27th July 2014. The appellant relied on the decision of the High Court in *John Barasa v. Republic*, Criminal. App. No. 22 of 2005 (Kitale) for the proposition that the court cannot rely on inconsistent or contradictory evidence.

11. It was also the appellant's submission that the prosecution evidence was not corroborated. He contended that JGM's evidence was not corroborated by production of the bloodied pyjamas and that since he was not medically examined, there was no evidence to link him with the infection that JGM had contracted. He also contended that although JGM had said that the appellant was wearing a red cap, a coloured shirt and a trouser at the material time, those clothes were not recovered from him and were not produced in evidence.

12. Lastly, the appellant submitted that the High Court did not consider his defence. He contended that he produced his identity card which had three names whilst the charge sheet had only two names, meaning that he was prosecuted on a case of mistaken identity.

13.The prosecution opposed the appeal vide written submissions dated 13th August 20025. Ms. Mengo, Prosecution Counsel, submitted that the prosecution proved its case beyond reasonable doubt. She added that all the ingredients of the offence of defilement, as identified in *Charles Wamukoya Karani v. Republic* [2015] eKLR were adequately proved. On the age of JGM, it was submitted that the evidence of her mother and the birth certificate proved that she was 9 years old at the time of the defilement.

14.Counsel further submitted that the evidence of JGM, her mother, and the medical evidence proved penetration, and as for the identity of the perpetrator, JGM, whom the trial court found to be a confident and truthful witness, was firm that she had been seeing the appellant fetching water in the school's vicinity before the defilement. Counsel cited the decision in *Peter Musau Mwanzia v. Republic* [2008] eKLR for the proposition that for purposes of recognition, all that is needed is assurance that the accused person was not a stranger to the witness and that the witness was able to recall having seen him before the incident, for example, as someone from the same vicinity.

15.On the contradictions alleged by the appellant, the respondent submitted that there were none and that the prosecution case was consistent and credible. It was further contended that if any contradictions existed, they were not of the magnitude that would dislodge the prosecution case. Counsel cited the decision of the Ugandan Court of Appeal in *Twehangane Alfred v. Uganda*, Crim. App. No. 139 of 2001 where it was held that the court will ignore minor contradictions which do not arise from deliberate untruthfulness and do not affect the substance of the prosecution case.

16.Lastly, on the appellant's contention that the first appellate court did not consider his defence, the respondent submitted that both courts below considered his defence but found that it did not displace the prosecution case. It was also contended that in the circumstances of the case, there was no substance in the appellant's contention that he was prosecuted out of mistaken identity because the charge sheet referred to two names while he was known by three names.

17.We have carefully considered this second appeal which, by law, is restricted to issues of law only. (See section 361 of the Criminal Procedure Code and *Karani v. Republic* [2010] 1 KLR 73).

18.Starting with the issue of identification, it is true that the only witness was JGM herself. She was clear that she had seen the appellant before in the vicinity fetching water from a tank near her school. She was candid enough that she did not know his name. Her credibility as a witness was boosted by PW4 who visited the locus in quo and confirmed the existence of the water tank that JGM had testified about as well as the thicket where she was defiled. Further, medical evidence confirmed that indeed, she had been defiled.

19. Section 124 of the Evidence Act allows a conviction to be based on the evidence of the victim alone if the court has assurance that the witness is a witness of truth. The section provides as follows: "...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."

20. In this case, the trial court believed the evidence of JGM. This is how the court evaluated her: "She was confront in testifying how the accused (the appellant) granted her, held her down in a thicket where he proceeded to remove her clothes, her pant the he removed his trousers and his penis and inserted it in her vagina. He also threatened her if she told anyone thus her silence when she got home. The medical examination and the reports further support this contention. The accused was a person familiar to her and the offence occurred in broad daytime. She identified him to the mother by the clothes he wore and by the fact that he was a person she used to see by the road fetching water... In the instant case, it is the finding of this court that the child was truthful and her evidence credible." (Emphasis added).

21. On its part, the High Court, after re-evaluating the evidence reached the same conclusion on the identity of the appellant as the perpetrator. We find no basis for interfering with these concurrent findings of the trial and the first appellate courts.

22. Our finding on this issue also disposes of the appellant's other contentions as regards his identification as the perpetrator, namely that he was identified by a single witness; that the evidence of JGM was not corroborated; that his clothes and JGM's pyjamas were not produced as exhibits; that an identification parade was not held; and that there was no medical evidence to link him with JGM's infection. We would only add the observation of this Court in *George Kioji v. Republic*, Criminal Appeal No. 270 of 2012, as regards proof of defilement: "Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the Evidence Act, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

23. The other issue raised by the appellant is that the High Court ignored contradictions and inconsistencies in the prosecution evidence. He cited as an example what he considered to be contradictions regarding the date of his arrest. While we agree that contradictions on material issues in a defilement case, such as identification of the perpetrator, the age of the victim, or penetration may form the basis for impeaching a conviction, it is not every inconsistency or discrepancy that justifies quashing a conviction. The authors of the treatise, Sarkar, *The Law of Evidence*, 16th Edition, 2007, P. 48 observe as follows as regards discrepancies in evidence: "Normal discrepancies in evidence are those which are due to normal errors of

observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do.

24. In *Philip Nzaka Watu v Republic* [2016] eKLR, this Court reasoned as follows: "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

25. Accordingly, we have not perceived any material contradiction in the prosecution evidence that would persuade us to come to a different conclusion from the concurrent findings of the trial court and the first appellate court.

26. The last issue raised by the appellant is failure of the two courts below to consider his defence. The appellant's defence was merely a denial of his having committed the offence and the contention that because the charge sheet bore two names while he is known by three names, the prosecution was based on mistaken identity. The trial court considered the defence on pages 6 and 7 of the judgment and rejected it. As for the High Court, it considered the appellant's defence in paragraphs 7 and 8 of the judgment and concluded as follows: "The appellant's defence that he was not the one who assaulted PW1 does not hold water as PW1 testified that he was familiar to her and the incident took place in broad daylight."

27.We must also add that nothing much turns on the appellant's contention that his prosecution was based on mistaken identity because of discrepancy in names. We say so because PW1 did not identify the appellant by name. In fact, from her evidence, she was candid enough that she did not know the appellant's name, but could recognise him, having previously seen him fetching water at attack near the school. To the extent that PW1 was able to recognise the appellant as the person who defiled him, it really did not matter whether he was known by two or three names.

28.For all the foregoing reasons, we find no merit in the appellant's appeal and hereby dismiss the same in its entirety. It is so ordered.

29.This judgment is signed and delivered by two judges pursuant to rule 34(3) of the Court of Appeal Rules.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY, 2026.K.

M'INOTI.....JUDGE OF APPEALM. GACHOKA, C.Arb,

FCI Arb.....JUDGE OF APPEALI certify that this is a True copy of the originalSignedDeputy Registrar

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