



**Bakari v Republic (Criminal Appeal E038 of 2022)  
[2024] KEHC 15607 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15607 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL E038 OF 2022  
AC BETT, J  
NOVEMBER 29, 2024**

**BETWEEN**

**PETER BAKARI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment, conviction and sentence of Hon. C.N Njalale, Senior Resident Magistrate in Butali SO No. 13 of 2019, delivered on 11th April 2022)*

**JUDGMENT**

1. The Appellant, Peter Bakari was convicted of the offence of defilement contrary to Section 8(1)(3) of the [Sexual Offences Act](#) No 3 of 2006. He was then sentenced to serve twenty (20) years imprisonment.
2. The particulars of the offence were that on diverse dates between July and August 2018 at (particulars withheld) within Kakamega county, the appellant caused his penis to penetrate the vagina of R.L., a child of 15 years.
3. The Appellant was also charged with an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). The particulars were that on diverse dates between July and August 2018 at (particulars withheld) Kakamega county, the appellant intentionally and unlawfully touched the breast and vagina of R.L., a child aged 15 years.
4. The Appellant was acquitted of the alternative charge.
5. The Appellant, in an undated Petition of Appeal, challenges the conviction and sentence on the following grounds: -
  - a. That the learned trial magistrate grossly erred in both law and facts by convicting and sentencing the appellant to 20 years imprisonment without considering that the age of the victim was not proven to the required standard.



- b. That the learned magistrate erred in law and facts by imposing a harsh sentence and conviction on the appellant without observing his rights under Article 50(2)(p) of *the Constitution* of Kenya 2010.
  - c. That the trial court failed to consider the appellant’s defence which fitted Section 8(5) of the *Sexual Offences Act* No.3 of 2006.
  - d. That the trial court irregularly shifted the burden of proof to the appellant and thereupon rejected his defence.
  - e. That the learned magistrate grossly erred in law and facts by placing reliance on flimsy, disjointed, malicious, fabricated and doubtful evidence which was not safe to be relied on.
  - f. That the trial magistrate grossly erred in law and facts by failing to consider the evidence of PW1 without inquiring into the need for corroboration.
  - g. That the trial court did not consider that there was a systemic plan and strategy to implicate the appellant.
  - h. That the decision of the trial magistrate was against the weight of the evidence and facts on record.
6. The appellant further submits the following supplementary grounds of appeal: -
- i. That the age of the complainant was not proved beyond reasonable doubt.
  - j. That the trial court erred in law and in fact in not appreciating the appellant’s defence pursuant to Section 8(5) a, b of the *Sexual Offences Act*.
  - k. That the trial court erred in law and in fact in not making a finding that the minimum mandatory nature of the sentence under section 8(3) of the *Sexual Offences Act* is unconstitutional and not warranted on plea.
  - l. That the trial court erred in law and fact in invoking Section 8(6) of the *Sexual Offences Act* without making a finding that the same is not in line with Article 45 of *the Constitution* and hence succumbs under Article 2(4) as unconstitutional.

### **Submissions**

7. The appeal was canvassed by way of written submissions where in his written submissions dated 27<sup>th</sup> November 2023, the Appellant argued that the age of the complainant was not proven beyond reasonable standard. He stated that while the charge sheet stated that the complainant was 15 years, the complainant in her statement said that she was born in 2003 November and that the P3 form as well indicated that the complainant was born in 2003 November. He argued that all these evidence on record failed to explain to the court how the age of the complainant was assessed.
8. The Appellant relied on the case of *Kaingu Alias Kasomo Vs Republic* (2010) eKLR, where the Court of Appeal held that: -
- “Section 107 *Evidence Act* Cap 80 laws of Kenya states that whoever desires the court to give the judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



9. He submitted that the clinical doctor, PW7, stated that the complainant's age was between 14-18 but failed to explain to the court how he assessed the complainant's age and thus the fact was not proven. He further submitted that the birth certificate of the complainant was not produced as an exhibit and hence the court could not rely on it. The appellant also relied on the case of Francis Omurono Vs Uganda Criminal Appeal No.2 of 2000 where the court held that: "We doubt if the courts are possessed of requisite expertise to assess the age by merely observing the victim, since in criminal trial the threshold is beyond any reasonable doubt." He submitted that the nature of evidence presented in proof of the victim's age has to be credible and reliable.
10. The Appellant further submitted that in the case of Hilary Nyongesa Vs Republic (2010) eKLR the court held that: "Age is such a critical aspect in Sexual Offences that it has to be conclusively proved and this becomes more important because punishment under *Sexual Offences Act* is determined by the age of the Victim." The appellant submitted that the onus of proving the age of a victim lies with the prosecution and a simple statement by the complainant as to their age does not in any view constitute that proof.
11. The Appellant also submitted that the complainant's conduct deceived him right from her history of having had a series of sexual partners. He also submitted that the argument by the trial court that since both the Appellant and the complainant lived in the same area, he ought to have known that the complainant was not an adult does not hold water since they have a very little age difference, and the Appellant could not have possibly seen the complainant being born to be able to keep track of her age.
12. The Appellant submitted that the trial court had an opportunity to recall witnesses or question him when it felt like he had introduced new matters in his defence rather than dismissing his defence as an afterthought and hence the court penalized him on its failure to discharge its duty. He also submitted that Article 45 of *the Constitution* has no requirement that when two partners have met and are proposing to marry, stating to each other that they are adults, they should certify their assertion by showing to each other their identity cards or birth certificates as argued by the trial court and that such law is unconstitutional.
13. The Appellant also relied on High Court Petition No 97 of 2021 Edwin Wachira & 9 Others vs Republic where the court declared the application of minimum mandatory sentences as being unconstitutional and granted orders that those affected may petition to the High Court for resentencing. He submitted that there was a lesser victim impact since neither he nor the complainant saw any wrong in his actions. He also submitted that he has served a sufficient term to meet the requirements of punishment, deterrence, and rehabilitation having transformed into a person who no longer posed a threat to the public.
14. The Respondent filed submissions dated 7<sup>th</sup> November 2023 and submitted that the trial court was right to find that the age of the complainant was proven. The Respondent submitted that the evidence of the complainant was corroborated by the P3 form and the clinic card since the complainant said that she was born in November 2003 and the P3 form and clinic card indicated the same month and year. They further submitted that Franklin Kapure, who is the Clinical Officer, established that the complainant was 15 years at the time.
15. The Respondent further submitted that penetration was proven because at the time of the medical examination, the complainant was pregnant. The Respondent submitted that on identification, the complainant and the Appellant were village mates hence they knew each other very well. They further submitted that the DNA analysis further confirmed the Appellant to be the perpetrator of the offence since he was identified as the father to the child that was sired from the sexual activities he had with the complainant.



16. The Respondent also submitted that the Appellant could not claim the defence under Section 8(5) of the *Sexual Offences Act* since he did not put the complainant to task, on how she deceived him, during her evidence. They submitted that a basis for deception was not laid during the cross-examination of the complainant. They further submitted that the Appellant never mentioned the acts that made him believe that the complainant acted like an adult and that he never stated to the court what the complainant told him to make him believe that she was an adult. The Respondent submitted that the Appellant never discharged his burden to make him achieve the benefit of the defence as provided for under Section 8(5) of the *Sexual Offences Act*.
17. The Respondent also submitted that the complainant at the time of the incident had not attained the age of discretion to be adjudged as being capable of being deceitful. The respondent relied on the case of *Wambui V Republic* (2019) eKLR where the court stated as follows: -
- “We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old and that the closer to 18 years the child is more likely the deception and more likely the belief that he or she is over the age of 18 years.” They submitted that the age of the complainant having been proved to be 15 years draws her away from the age bracket of the class of minors that would likely deceive or act in deception that they are over 18 years old.
18. On the issue of the mandatory minimum sentence being unconstitutional, the Respondent submitted that the sentence meted to the appellant herein was proper. The respondent relied on Paragraphs 2.3.16 and 2. 3.17 of the sentencing guidelines gazetted on 1<sup>st</sup> September 2023 which provides as follows: -
- “2.3.16 where the law provides mandatory minimum sentences the court is bound by those provisions and must not impose a sentence lower than what is prescribed. A fine should not substitute a term of imprisonment where a minimum term of imprisonment is the only option provided. Courts must however remain cognizant of any changes made in the applicability of mandatory minimum sentences with respect to specific given clear concerns that have been raised in a number of cases about constitutionality of such sentences.”
- “2.3.17 until the Supreme Court decides on the matter to the contrary, judicial officers and judges must adhere to the prevailing legislative frameworks, jurisprudence from courts and SPGs 2022 during sentencing on the issue of applicability of the mandatory minimum sentences.”
19. The Respondent further submitted that the guidelines can be interpreted to mean that unless the Supreme Court changes or decides on the matter of mandatory minimum sentences the minimum sentences implied by the law should be applied as they are.

## **Analysis**

20. This being a first appeal, the duty of a first appellate court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded was well established in *Mark Oiruri Mose v.R* [2013] eKLR, this principle was enunciated thus:-
- “...the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always



bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”

21. Accordingly, I have re-considered and re-evaluated the evidence that was presented before the lower court.
22. In summary, the prosecution’s case was that on diverse dates between July and August 2018, particularly on sports day, the complainant was called by the Appellant who was at the time standing at the school’s gate. That the complainant went to meet the Appellant who informed her that he wanted to have a sexual relationship with her. That the complainant accepted the romantic advances and after several sexual escapades the complainant realized she was pregnant in the month of September 2018. The prosecution’s case was that the deputy head teacher having noted the friendship between the Appellant and the complainant reported the same to the complainant’s mother. That the deputy head teacher advised the complainant’s mother to take the complainant to hospital for check-up, but the mother did not. The evidence was that the complainant’s parents came to learn of her pregnancy almost six (6) months into the pregnancy whereby they reported the matter at Matete Police Station and took the complainant to Matete Health Centre. That the complainant gave birth on 5<sup>th</sup> March 2019. The complainant testified she was born in November 2003 and identified treatment notes, mother and child book and a P3 form to support her case.
23. In cross-examination, PW1 who is the complainant, stated that prior to the incident, she had had sex with one EM in 2017. She also testified that she told the Appellant of the pregnancy because she knew she was impregnated by him.
24. CNI, the complainant’s mother, testified as PW2. She stated that on 27<sup>th</sup> July 2018, she was called to go to Maungu Primary School where her daughter was schooling. She stated that the deputy head teacher informed her that the Appellant was a bad influence on her daughter. She averred that the complainant denied being involved with the Appellant but later admitted, upon being beaten by her brother, that the Appellant would pick her and take her to his house. She stated that the complainant denied being pregnant but in December 2018, the complainant’s father suspected that the complainant was pregnant and directed that she should be taken to hospital. She further stated that at the hospital, the doctor found out that the complainant was 4-5 months pregnant at the time and was suffering from a sexually transmitted disease. She stated that after the complainant gave birth, a DNA test was conducted which test confirmed the Appellant to be the father of the child.
25. In cross-examination, PW2 said that the doctor established that the complainant was pregnant at 5 months. She further stated that the complainant informed her that she had sex with the Appellant.
26. Richard Lagat, a government analyst, testified as PW3 on behalf of his colleague Dalmas Sang. He produced a report which indicated that the Appellant was the father of the complainant’s child. The report was done on 9<sup>th</sup> February 2021 and was signed by the officer and it was produced in court as Exhibit P5.
27. In cross-examination, PW3 said that the child shares half of the Appellant’s DNA and half of the complainant’s DNA.
28. Franklin Kapure, A Clinical Officer, testified as PW4. He averred that he examined the complainant who at the time was 20 weeks pregnant. He stated that a urine test was done which revealed presence of bacterial infection, pus cells and epithelial cells which revealed fungal and yeast infections. He stated that he administered antibiotic therapy and anti-fungal and the complainant began ante- natal clinics. He produced treatment notes, clinic card and a P3 form as exhibit P1, P2 and P3 respectively.



29. In cross-examination, PW4 stated that the complainant went to the facility on 5<sup>th</sup> December 2018 and that the P3 form was filled on 12<sup>th</sup> December 2018. He also stated that according to the findings of the examination, the complainant was not coerced or raped.
30. After the close of the prosecution's case, the Appellant chose to give a sworn testimony and did not call any witness.
31. In his testimony, the Appellant denied raping the complainant and stated that he was in a relationship with her for a long time and that as a result, a child was born from the relationship. He stated that at the time of the incident, he was 20 years old and that the complainant had informed him that she was 18 years old. He stated that the complainant acted as an adult at the time, causing him to believe her. He stated that he did not request to see the complainant's birth certificate or identification card.
32. In cross-examination, the Appellant reiterated that he had been in a relationship with the complainant between November 2017 to November 2018. He stated that during the subsistence of the relationship, he did not know that the complainant was a student. He stated that after the incident, he heard that the complainant was a student at Maungu Primary School, a fact he was not aware of prior to the incident. He acknowledged that he came from the same village with the complainant. He further stated that it was after the incident that he learned he was related to the complainant.
33. I will now address the pertinent issues that arise in this appeal as hereunder: -

**a. Whether the age of the complainant was proven beyond reasonable doubt**

34. It is trite law that proof of age is a critical matter in sexual offences. The court in the case of Hadson Ali Mwachongo Vs. Republic [2016] eKLR agreed with this position and stated as follows:

“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”
35. Similarly, the Court of Appeal in Alfayo Gombe Okello v Republic [2010] eKLR 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 a 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).”
36. In the present appeal, the Appellant claims that an age assessment report was given stating that the complainant was between 14-18 years, but the doctor failed to explain how he assessed the complainant's age. This court has perused through the record of exhibits that were presented to the trial court, and it has found that there is no record of an age assessment report as contended by the appellant herein.
37. The Respondent contends that from the P3 form, clinical card and the evidence of the complainant, the prosecution met their evidentiary burden of proving the complainant's age.



38. In the case of *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...”

39. Further, 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.”

40. Although the best evidence to prove age is a birth certificate or an age assessment report, from the authorities considered in this appeal, medical evidence as to the apparent age, in the absence of such proof, would suffice as proof of age. Flowing from the reasoning in the above cited decisions, from the P3 form that was adduced by the prosecution in the trial court, I believe that the age indicated on it, being 15 years, suffices as the apparent age of the complainant considering the fact that the assessment was done by a medical professional.

**b. Whether the trial court erred in law and in fact in not making a finding that the minimum mandatory nature of the sentence under section 8(3) of the *Sexual Offences Act* is unconstitutional and not warranted on plea.**

41. On this matter, I wish to rely on the directions issued by the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] (Directions) eKLR. The court, with regards to its decision on the unconstitutionality of the mandatory death sentence, stated as follows:

“The Supreme Court’s decision did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute. The decision was not an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with *the Constitution*.”

42. The Supreme Court, as a result, issued sentencing guidelines gazetted on 1<sup>st</sup> September 2023. I wish to rely on Sections 2.3.16 and 2.3.17 of the said guidelines which provides as follows:

“2. where the law provides mandatory minimum sentences the court is bound by  
3.16 those provisions and must not impose a sentence lower than what is prescribed.  
A fine should not substitute a term of imprisonment where a minimum term



of imprisonment is the only option provided. Courts must however remain cognizant of any changes made in the applicability of mandatory minimum sentences with respect to specific given clear concerns that have been raised in a number of cases about constitutionality of such sentences.”

“2.3.17 until the Supreme Court decides on the matter to the contrary, judicial officers and judges must adhere to the prevailing legislative frameworks, jurisprudence from courts and SPGs 2022 during sentencing on the issue of applicability of the mandatory minimum sentences.”

43. From the foregoing, I find that the sentence meted out by the trial magistrate was well within the tenets of the law.

**c. Whether the trial court failed to consider the appellant’s defence which fitted Section 8(5) of the Sexual Offences Act No.3 of 2006.**

44. Section 8(5) of the Sexual Offences Act provides as follows: -

“(5) It is a defence to a charge under this section if—

- (a) it is proved that such child, deceived the accused person into believing that he or she was over the age of eighteen years at the time of the alleged commission of the offence; and
- (b) the accused reasonably believed that the child was over the age of eighteen years.”

45. In the trial court, the Appellant claimed that the complainant had told him that she was 18 years old. He claimed that the complainant acted like an adult. The trial court was of the opinion that the Appellant raised the defence as an afterthought since the Appellant did not raise the issue during the cross-examination of the claimant or her witnesses. The trial court was also of the opinion that the Appellant’s defence was unbelievable since the complainant had mentioned that they first met when the complainant was in school, and the Appellant being from the same village as the complainant, he ought to have known that the complainant was a primary school going child. The trial court also found that the Appellant did not specify the acts that led him to believe that the complainant was an adult as he alleged.

46. I concur with the trial court on this matter. Since the Appellant and the complainant first met during a primary school sports event, it is absurd for the Appellant to claim that he believed that the complainant was an adult. Even though it may be argued that not every primary school-going person is below the statutory age, the fact that the complainant was a primary school-going child should have prompted the Appellant, who was aged 20 years at the time, to take the necessary steps to ascertain that the complainant was an adult as stipulated by Section 8(6) of the Sexual Offences Act. Contrary to the Appellant’s averment, there is a considerable age gap between a 15 year old and a 20 year old. In any event, a reasonable man would have no grounds to believe that a primary school child is above the age of 18 years.

47. Based on the aforesaid, I also find that the Appellant’s claim that the trial court erred in law and fact in invoking Section 8(6) of the Sexual Offences Act without making a finding that the same is not in line with Article 45 of the Constitution, to be vexatious and a futile attempt at subverting justice.



### **Determination**

48. For the reasons stated above, I find that the conviction of the appellant is sound, and the sentence imposed in respect thereof lawful. I accordingly dismiss the appeal and uphold both the sentence and conviction.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**A. C. BETT**

**JUDGE**

In the presence of:

Appellant present virtually at Kisumu Maximum Prison

Ms. Chala for the Prosecution/Respondent

Court Assistant: Polycap

