



**Republic v Nyaga (Criminal Appeal E056 of 2024)  
[2024] KEHC 14981 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14981 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E056 OF 2024  
LM NJUGUNA, J  
NOVEMBER 27, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**DERRICK MUTWIRI NYAGA ..... RESPONDENT**

*(Appeal arising from the decision of Hon. F. Kyambia (CM) in the Chief Magistrate’s Court at Embu MCSO No. 46 of 2020 delivered on 10th July 2024)*

**JUDGMENT**

1. The appellant has filed a petition of appeal dated 25<sup>th</sup> July 2024 seeking that the appeal be allowed and the respondent be convicted and sentenced accordingly. The appeal is premised on grounds that:
  - a. The trial magistrate erred in law and fact by not convicting the respondent yet the appellant proved beyond reasonable doubt the ingredients of the offence of defilement as provided in section 8(1) as read with 8(3) of the *Sexual Offences Act*, against the respondent; and
  - b. The trial magistrate erred in law and fact by finding that the complainant accepted to be taken to a lodging and may have deceived the respondent to believe that the complainant was of age, yet the complainant was minor at the time and incapable of giving consent to any sexual act.
2. The respondent was charged with the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act*. The particulars of the offence are that, on 02<sup>nd</sup> August 2020 at around 0200hrs at Kathugu village in Kianjuki sublocation in Embu North sub-county within Embu County, the respondent intentionally and unlawfully caused his penis to penetrate the vagina of CMM, a child aged 15 years. He also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No.3 of 2006, whose particulars are that on 02<sup>nd</sup> August 2020 at around 0200hrs at Kathugu village in Kianjuki sublocation in Embu North sub-



county within Embu County, the respondent intentionally and unlawfully caused his penis to touch the vagina of CMM, a child aged 15 years.

3. The respondent pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
4. PW1 was the victim who stated that the respondent who is a boda-boda rider was her friend. She stated that in March 2020, he called her and asked her if she was available so that he could take her somewhere and she accepted. That he picked her up and took her to a lodging at Kianjokoma where they had sex and he dropped her back home. She did not tell anyone about the incident and on 22<sup>nd</sup> August 2020, the respondent called her again and when she confirmed her availability, he picked her up and took her to his house.
5. That while there, the respondent gave her water and suddenly she became dizzy and passed out. She stated that when she woke up, she felt pain on her thighs and the respondent told her to take some medicine called P2 but she refused and went home. That after 2 weeks she began feeling unwell and she was discovered to be pregnant. That she was taken to Embu Level 5 Hospital where a P3 and PRC form were filled. On cross-examination, she stated that she went to the respondent's house which is wooden and it does not have a concrete floor.
6. PW2, the victim's mother, stated that PW1 was born in November 2005 and she produced a copy of the birth certificate as evidence. She stated that PW1 was vomiting and feeling dizzy and when she was taken to a nearby hospital, she was discovered to be pregnant. That the doctor advised her to report the matter to the police and she went to Kavutiri Police Station where the report was booked and they were taken to Embu Level 5 Hospital where the pregnancy was confirmed. PW1 named the respondent as the man responsible for the pregnancy and the police arrested him.
7. PW3 was Dr. Phyllis Muhonja of Embu Level 5 Hospital who produced the P3 and PRC forms for the victim who had told her that she had consensual sex with the respondent. The victim also told her that the respondent wanted the pregnancy and that he was her boyfriend. Upon examination of the victim, she noted that the hymen was missing and there was a whitish discharge. She did further tests and ascertained that the victim was pregnant and she was placed in their antenatal clinic.
8. PW4 was PC Jane Gichovi of Kavutiri Police Post who stated that she was assigned the case by the officer in charge of the station. That she interrogated the victim and then escorted her to Embu Level 5 Hospital where she was examined and a P3 form was filled. The victim's birth certificate was also provided and she named the respondent as the man she had had sex with several times. She stated that the respondent was called on his phone and he went to the police station.
9. After the close of the prosecution's case, the court found that the respondent had a case to answer and placed him on his defense.
10. In his defense, the respondent denied the allegations and stated that he was not the father of the child. He asked for a DNA test since the child had already been born. The court ordered that the respondent and the child be taken to a nearby facility for collection of samples for DNA testing. The DNA results were brought back to court and they showed that the respondent was the father of the child.
11. Later, he defended himself saying that he knows it is wrong to have sex with a girl who is below 18 years but, in this case, the victim is his girlfriend and he did not know that she was a minor. That if he knew that the victim was a minor, he would not have had sex with her. That he has been taking care of the child since birth. On cross-examination, he stated that the victim told him that she was in high school although he never saw her with a school uniform. That he never asked her for her national ID to confirm that she was of age. He confirmed that he impregnated the victim.



12. After close of the defense case, the trial court found that the appellant failed to prove the age of the complainant because they produced a copy of the birth certificate and not the original document. That the same fell short of the requirements under section 66 of the *Evidence Act*. He relied on the case of Eliud Waweru Wambui v. Republic (2019) eKLR. The trial magistrate also found that the respondent rightly relied on the defense under section 8(5)&(6) of the *Sexual Offences Act* since the alleged age of the victim and the respondent's were close. The respondent was acquitted of the charge.
13. The appeal herein was canvassed by way of written submissions.
14. The appellant placed reliance on the case of Simiyu & Another v. Republic (2005) eKLR for the elements of the offence of defilement. It further relied on the case of AML v Republic (2012) eKLR and argued that the evidence was sufficient to convict the respondent. It was its argument that the DNA evidence and the testimony of PW1 are both useful in identifying the respondent as the assailant. On the element of age of the victim, it relied on the cases of Peter Musau Mwanzia v. Republic (2008) eKLR, Stephen Ouma Ogolla v Republic (2015) eKLR and Tumaini Masai Mwanza v. Republic (Criminal Appeal 80 of 2009) (2010) KEHC 1353 (KLR) and argued that the evidence proves that the victim was a minor at the time of the incident.
15. It relied on the definition of the word child according Article 260 of *the Constitution*, section 2 of the *Children Act* and the United Nation's Convention on the Rights of the Child (UNCRC). Further reliance was placed on the cases of Bakari Nodoro v. Republic (2016) eKLR, Edwin Nyambogo Onsongo v. Republic (2016) eKLR, Faustine Mchanga v Republic (2012) eKLR and Richard Wahome Chege v Republic (2014) eKLR. It stated that the defense under section 8(5)&(6) of the *Sexual Offences Act* as relied on by the respondent does not hold because he knew the victim was a minor but proceeded to have sexual relations with her. That the fact that the victim accepted to go with him to a lodging does not mean that the victim was inferring that she was of age. It urged the court to allow the appeal.
16. The respondent submitted that the copy of birth certificate was not sufficient evidence to prove the age of the victim. He relied on the case of Eliud Waweru Wambui v. Republic (2016) eKLR and the arguments of the court on proof of age of the victim of a sexual offence.
17. From the foregoing, the issue for determination is whether the trial court erred in acquitting the respondent given the circumstances.
18. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of Okeno vs. Republic [1972] EA 32 I agree with the court when it 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 the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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.”
19. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:
  - a. The age of the complainant- that the complainant was a child;



- b. Penetration occurred; and
  - c. The perpetrator was positively identified.
20. The victim who was PW1 testified that she was 15 years old at the time of the incident. PW2, her mother, produced a copy of the victim's birth certificate stating that she was born in November 2005. The trial magistrate took issue with the fact that the original birth certificate was not produced and he cited section 66 of the Evidence Act on production of secondary evidence. He stated that the copy produced was not certified. He relied on the case of Edwin Nyambogo Onsongo v. Republic (2019) eKLR where the Court of Appeal stated that the evidence on age of the victim should comply with the provisions of section 66 of the Evidence Act. In that case, the victim was 17 years and 5 months at the time of the incident. It was very important of the court to clearly ascertain the age of victim because the victim and the appellant had sworn to marry each other since they were already in a sexual relationship. The accused person in that case also relied on the defense under section 8(5)&(6) of the Sexual offences Act.
21. At the time of the testimony, the trial court was satisfied that she was not a child of tender age thus she gave sworn testimony stating that she was 15 years old. In the case of Mwalango Chichoro Mwanjembe v. Republic [2016] KECA 183 (KLR), the court stated that:
- “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 documentary 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.”
22. In the case of Francis Omuroni v. Uganda Criminal Appeal No 2 of 2020, the Court of Appeal of Uganda stated as follows on proof of age in defilement case:
- “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 also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...”
23. A copy of the birth certificate was produced by PW2 as proof of the victim's age. Section 66 of the Evidence provides a list that is not necessarily exhaustive and it include an oral account of a person who has seen the document that would be produced as evidence. It states:
- Secondary evidence includes—
- (a) certified copies given under the provisions hereinafter contained;
  - (b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;
  - (c) copies made from or compared with the original;
  - (d) counterparts of documents as against the parties who did not execute them;
  - (e) oral accounts of the contents of a document given by some person who has himself seen it.
24. It is my view that the testimony of the victim's mother on the contents of the copy of birth certificate is sufficient to prove the age of the victim. Also, I am persuaded that her evidence as the mother of the



- victim, alone, without any other document, would have passed as sufficient proof of age. That, coupled with the testimony of the victim herself, satisfy the requirement of the first element.
25. On the element of penetration, PW1 testified that the respondent invited her to his house where he gave her water that made her dizzy and then she passed out. That when she woke up, she felt pain on her thighs and the respondent gave her medicine called P2 but she did not take it. That she had had sex with the respondent before that day and soon enough, she was found to be pregnant. At the time of examination, PW4 testified that PW1 was about 8 weeks pregnant and the examination revealed that her hymen was missing. This is sufficient proof of penetration.
26. On identification of the assailant, PW1 named the respondent as the person who defiled her. In his defense, the respondent, at first denied that he had any sexual relations with the victim and he demanded for a paternity test which was positive and confirmed that he was the father of the victim's child. It is only after this that the respondent testified that the victim is her girlfriend and that he had sexual relations with her. He stated that he has since taken responsibility for the child. That at the time of the incident, he did not know that the victim was a minor.
27. This defense is provided for under Section 8(5)&(6) of the *Sexual Offences Act* 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.
- (6) The belief referred to in subsection (5) (b) is to be determined having regard to all the circumstances, including any steps the accused person took to ascertain the age of the complainant.”
28. It is expected that if the respondent pleaded this defense, the burden shifts to him to prove that he took reasonable steps to ascertain the age of the victim. From the uncontroverted evidence of PW1, on the day of the incident, she was not even awake to witness the act because the respondent gave her water that was seemingly drugged, which made her to pass out and she woke up with pain in her thighs. To this court, it does not matter much whether the respondent and the victim had sex before the date reported in the charge sheet. Rather, it matters that on the material date herein, the respondent did not take any steps to find out whether the victim was a minor, for instance by asking if she had a national ID, etc.
29. On cross-examination, the respondent stated that he knew that the victim was a high school student but he never saw her in uniform. That he did not ask her if she had a national ID and that if he had known that she was a minor, he would not have engaged in sexual relations with her. It is my view that the respondent cannot benefit from the defense under Section 8(5)&(6) of the *Sexual Offences Act*.
30. Given my findings on the age of the victim at the time of the incident, the victim was incapable of giving consent to sexual relations, regardless of the nature of friendship that may have been in place between the respondent and herself.
31. That being said, having considered the evidence adduced at trial, this court finds that the offence of defilement contrary to section 8(1) as read together with section 8(3) of the *Sexual Offences Act* has been proved beyond reasonable doubt and the respondent is hereby convicted accordingly.



32. Consequently, the appeal is hereby allowed and the judgment of the trial court acquitting the respondent is hereby set aside.

33. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... **for the Appellant**

.....**for the Respondent**

