



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimilu v Republic (Criminal Appeal E099 of 2021)  
[2023] KEHC 210 (KLR) (24 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 210 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E099 OF 2021  
GMA DULU, J  
JANUARY 24, 2023**

**BETWEEN**

**BENSON MUUO KIMILU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original judgment of Hon. Mayamba C.A in Kilungu Principal Magistrate's Court CMCR (S.O) Case No.38 of 2020 pronounced on 11th March 2021)*

**JUDGMENT**

1. The appellant was charged in the magistrate's court with defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 18<sup>th</sup> December 2015 in Kilungu Sub-County within Makueni County, unlawfully and intentionally committed an act which caused penetration of his genital organ to the genital organ of a child aged 15 years.
2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, the particulars of which being that on the same date and at the same place intentionally committed an indecent act with FNM a child aged 15 years by touching her genital organ.
3. He denied both charges. After a full trial, he was convicted on the main charge of defilement and sentenced to 18 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds –
  - 1) That he was sentenced to serve 18 years imprisonment when there was no plea of guilty entered.



- 2) That the case was fabricated by Pw1's father.
  - 3) That he was not responsible for the pregnancy of Pw1.
  - 4) That the prosecution evidence which was fake was not considered by the magistrate.
  - 5) That the appellate court should consider facts ignored by the lower court.
  - 6) That he is ready to comply with any other option the court will deem fit in the circumstances.
5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions. I note that the appellant states in submissions that he merely gave shelter to the complainant, and that the pregnancy was not his.
  6. This being a first appeal, I am required to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] E.A 32.
  7. In proving their case, the prosecution called 5 witnesses. The appellant on his part tendered sworn defence testimony and did not call additional witnesses.
  8. The elements of the offence of defilement are the age of the victim (complainant) who should be below 18 years. Secondly the act of penetration even if partial. Thirdly, the identity of the culprit.
  9. With regard to the element of age, the victim Pw1 FNM said she was 17 years at the time she testified. It was a retrial. Pw3 MM the father of Pw1 testified that the complainant was 15 years at the time of the alleged incident. He said that Pw1 was born on 29/04/2003 and was in class 7. He produced a birth certificate in evidence as exhibit. I find that the prosecution proved beyond reasonable doubt that the complainant was 15 years old at the time of the incident.
  10. With regard to sexual penetration, I note from the evidence of the complainant Pw1 and the medical evidence of Pw4 Erick Kasiamani a Clinical Officer at Kilungu that the complainant was pregnant at the time the case was progressing in court.
  11. Though the appellant has contended that he did not defile the complainant as no DNA test was conducted to establish paternity of the child, in my view, the absence of DNA test does not absolve him. This is because, the fact that the victim was pregnant before the two met and had sexual intercourse did not vitiate the offence. It might only be considered as mitigation.
  12. From the evidence on record from the complainant Pw1, that they were lovers with the appellant before her leaving home to go and stay with him, and the fact that they lived together for three days as husband and wife, in my view, the prosecution proved beyond any reasonable doubt that penetration of a sexual nature did occur between the appellant and the complainant.
  13. With regard to the culprit, I am also of the view that the prosecution proved beyond reasonable doubt that the appellant was the culprit, as an independent witness Pw2 Isaac Ndolo Nyarita was present when the complainant was found with the appellant in the house of the appellant in broad daylight. I thus like the trial magistrate, find that the appellant was the culprit of the offence charged whether or not he was the father of the child of the pregnancy.
  14. Having said as above however, in my view the trial court was in error when it convicted and sentenced the appellant as the conduct of the complainant brought into play the defence in favour of the appellant



in terms of section 8(5) of the Sexual Offences Act. In my view, the complainant's conduct of walking away from her home, and going to live with a man at her age of 15 years, would make any reasonable man believe that she was an adult. On that account alone, I find that the magistrate should have acquitted the appellant, and I will acquit him on that account alone.

15. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

**DELIVERED, SIGNED & DATED THIS 24<sup>TH</sup> DAY OF JANUARY 2023, IN OPEN COURT AT MAKUENI.**

.....

**GEORGE DULU**

**JUDGE**

