



**Wanjiku v Republic (Criminal Appeal E007 of 2022)  
[2022] KEHC 14347 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14347 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CRIMINAL APPEAL E007 OF 2022**

**M MUYA, J**

**OCTOBER 27, 2022**

**BETWEEN**

**BONIFACE WAITURU WANJIKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**Requirements for an accused person to successfully raise a defence to a charge of defilement under section 8(5) of the Sexual Offences Act**

*The appeal was against the conviction and sentence to 20 years' imprisonment of the appellant for the offence of defilement of a child aged 12 years and 11 months. The appellant had purported to rely on the defence under section 8(5) and (6) of the sexual offences act that he was under the belief that the complainant was an adult. The court held that the appellant could not qualify under the defence provided under that section of the law as he knew the complainant before as well as the school she was attending.*

Reported by Kakai Toili

***Criminal Law** – sexual offences – defilement – defences for the offence of defilement – requirements for an accused person to successfully raise a defence to a charge of defilement under section 8(5) and (6) of the Sexual Offences Act - whether an accused person who believed that the complainant was an adult could rely on such as a defence against their charge of defilement – Sexual Offences Act (cap 63A), section 8(5) and (6).*

**Brief facts**

The appellant was convicted and sentenced to 20 years' imprisonment for the offence of defilement of a child aged 12 years and 11 months contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, No 3 of 2006 (the Act). The appellant appealed on several grounds including that the trial court erred both law and fact; in placing reliance on inconsistent and contradictory prosecution evidence; in failing to consider that the victim was a truant child who had already ran away from the family hence unreliable; and that by failure to note that the case was grounded on extortion by the parents of the victim.



## Issues

- i. What were the requirements for an accused person to successfully raise a defence to a charge of defilement under section 8(5) and (6) of the Sexual Offences Act?
- ii. Whether an accused person who believed that the complainant was an adult could rely on such as a defence against their charge of defilement.

## Held

1. The appellant admitted that he had sexual intercourse with the complainant on the material day. What appeared to be his contention was that he honestly believed that the complainant was over the age of 18 years. That was why in his evidence he stated that he had asked the complainant whether she had an identity card.
2. The complainant's mother (PW2) testified that the complainant was aged ten years old. There was no better evidence one could get than that of the mother who gave birth. The age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant herself. PW2 informed the court that her daughter was born on July 16, 2008. A child health card was produced indicating the date of birth of the complainant as July 16, 2008. However, the name was shown as EK. That discrepancy was explained away by the mother who stated that it was her local pastor who decided to have her name changed so as to attract favour.
3. It was a defence to a charge of defilement under section 8(5) of the Sexual Offences Act if it was proved that such child, deceived the accused person into believing that he or she was over the age of 18 years at the time of the alleged commission of the offence; and the accused reasonably believed that the child was over the age of 18 years.
4. The appellant did not deny having known the complainant before as a pupil. He was a *boda-boda* rider and he used to ferry children to the institution she was attending. The appellant could not qualify under the defence provided under section 8(5) of the Act as he knew the complainant before and the school she was attending. The trial court noted that the neighbours to the accused complained that there was a certain *boda-boda* person who was staying with a child at that estate. That was a clear indication that it was not the first time that the accused had an encounter with the complainant in his house as he was staying with her before police went there and arrested him.
5. The evidence adduced by the prosecution against the appellant was overwhelming and there was no good ground to interfere on both the conviction and the sentence.

*Appeal dismissed.*

## Citations

### Cases

#### Kenya

*Chege, Richard Wahome v Republic* Criminal Appeal 61 of 2014; [2014] KECA 453 (KLR) — Explained

#### Regional Court

*Okeno v Republic* [1972] EA 32 — (Applied)

## Statutes

### Kenya

Sexual Offences Act (cap 63A) section 8(1)(3)(5) — (Interpreted)

## Advocates

*Mwaniki* for the respondent



## JUDGMENT

1. The appellant was convicted and sentenced to 20 years imprisonment for the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars being that on the 9<sup>th</sup> day of July 2021 at [Particulars Withheld] village in Nyeri sub county within Nyeri County he intentionally and unlawfully caused his penis to penetrate the vagina of FAM a child aged 12 years and eleven months.
3. The appellant has listed the following grounds of appeal.
  - a. That the learned trial magistrate erred in both law and fact in placing reliance on inconsistent and contradictory prosecution evidence.
  - b. That the learned trial magistrate erred in both law and fact in failing to consider that the victim was a truant child who had already ran away from the family hence unreliable.
  - c. That the learned trial magistrate erred in both law and fact by failure to note that the case was grounded on extortion by the parents of the victim.
4. This being the first appellate court, it has a duty to re-evaluate and examine afresh the evidence on record so as to arrive at its own independent conclusion bearing in mind that it did not have the opportunity to observe the demeanor of the witnesses – *Okeno vs R* 1972 EA page 32

### Brief facts

5. At the time of the alleged defilement on July 9, 2021 the complainant was one month shy of the age of thirteen and was in class seven. After a voire dire examination the learned trial magistrate was satisfied that she possessed sufficient intelligence as to understand the meaning of an oath. She conceded to have left her parental home on June 2, 2021 and proceeded to do truancy at Othaya township sleeping at [Particulars Withheld] till she met the appellant on July 9, 2021 at around 10:00 P.M and after a chat she agreed to spend a night with him at his abode after he bought her a packet of chips. She testified that she had sexual intercourse with the appellant that night. The following day police officers visited them and proceeded to arrest the appellant. The complainant was taken to Othaya Level 4 Hospital for examination and treatment.
6. The mother of the complainant testified as PW2 and informed the court that her daughter was born on July 16, 2008. She produced in court her clinic card but said that the birth certificate was lost. She further testified that her daughter went missing from home and she had been searching for her, she had received information that she had been sighted riding motorcycles with other youths, later she received information that she had been found in the company of the appellant who was arrested by police.
7. In his defence the appellant opted to give a sworn statement. He informed the court that he operates a bodaboda (motor cycle rider carrying passengers at a fee) and that while in the course of his duty on July 9, 2021 he met the complainant at [Particulars Withheld] at around 10.00 PM She informed him that she was hungry. He asked her whether she had an identity card. She answered in the affirmative but said that she had left it at her home at [Particulars Withheld]. She requested that they go together so that the following day she could go home. They went together and she ate. The following day at around 8.00 AM police went and arrested him. That's when he came to know that she had no identity card.



8. On cross-examination he conceded that he used to ferry the complainant on his bodaboda registration No KMEL 891 J and that he did go to his house with the complainant who had requested to sleep there. He admitted that he had sex with her twice and that he thought she had an identification card.

### Legal Analysis and Conclusion

9. The appellant was convicted under the *Sexual Offences Act*. Section 8(3) of the Act provides:-
1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
  2. A person who commits an offence of defilement with child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”
10. A perusal of the evidence on record shows that the appellant did admit that he had Sexual intercourse with the complainant on the material day. What appears to be his contention is that he honestly believed that the complainant was over the age of eighteen years. That is why in his evidence he stated that he had asked the complainant whether she had an identity card.
11. It is noted that during cross-examination of the complainant the appellant did not raise the issue of having asked her for her identity card or any question as to her age status.
12. While deliberating on the issue of age, the learned trial magistrate did place reliance on the court of appeal case of *Richard Wabome Chege Versus Republic* [2014] eKLR where it was held:-
- “On the contention that the age of the complainant was no proved if it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was aged ten years old. What better evidence can one get then that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant herself.”
13. In the present case the complainant’s mother who testified as PW2 informed the court that her daughter was born on 16<sup>th</sup> day of July 2008.
14. A child Health Card was produced indicating the date of birth of the complainant as July 16, 2008. However the name is shown as EK. This discrepancy was explained away by the mother who stated that it is her local pastor who decided to have her name changed so as to attract favour.
15. Section 8(5) of the *Sexual Offences Act* provides thus:-
- “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.
  - c. The belief referred to in subsection 5(b) is to be determined having regard to all circumstances, including any steps the accused person took to ascertain the age of the complainant.”
16. As noted earlier, during cross-examination of the complainant the accused did not allude to the issue of demanding to be shown identification documents so as to ascertain her age. The complainant did admit that she had left her parents’ home for close to one month and was staying in the streets of Othaya



town. She also testified to have known the accused for one year and that he knew that she was in school as he used to take pupils to that school. The appellant's contention is that the complainant lied to him over her age. (The appellant did not deny having known the complainant before as a pupil. He was abode boda rider and he use to ferry children to the institution she was attending.

17. The appellant therefore cannot qualify under the defence provided under section 8(5) of the [Sexual Offences Act](#) as he knew the complainant before and the school she was attending.

The learned trial magistrate did note that the neighbours to the accused did complain that there was a certain bodaboda person who was staying with a child at [Particulars Withheld] Estate. This was a clear indication that it was not the first time that the accused had an encounter with the complainant in his house as he was staying with her before police went there and arrested him.

### **Conclusion**

18. I find the evidence adduced by the prosecution against the appellant was overwhelming and there is not good ground to interfere on both the conviction and the sentence. The appeal has no merit and it's dismissed.

**JUDGMENT DELIVERED, READ, SIGNED AND DATED THIS 27TH DAY OF OCTOBER, 2022.**

**HON. JUSTICE M. MUYA**

**JUDGE**

In the presence of:

Present: Appellant

Mwaniki: Respondent

Court Assistant: Kinyua

30 days R/A

