



**Joseph Kaya Omollo v Republic (Criminal Appeal 37 of 2016)  
[2018] KEHC 7295 (KLR) (12 April 2018) (Judgment)**

*Joseph Kaya Omollo v Republic [2018] eKLR*

Neutral citation: [2018] KEHC 7295 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CRIMINAL APPEAL 37 OF 2016  
HK CHEMITEI, J  
APRIL 12, 2018**

**BETWEEN**

**JOSEPH KAYA OMOLLO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal arising from conviction and sentence in Kitale Sexual  
Offence No. 3205 of 2014 delivered by M.I.G. Moranga Principal Magistrate)*

**A complainant's representations of age at the time of commission of an offence, is a defence on a charge of defilement.**

*A complainant's representations at the time of commission of the offence to the effect that she was an adult, is a defence to the offence of defilement. For purposes of the defence, it was necessary to establish any steps that the accused took to establish the age of the complainant.*

Reported by Beryl A Ikamari

**Criminal Law** - defilement - defences to the offence of defilement - apparent age of the Complainant - where a complainant had presented herself as an adult who was capable of marriage - whether such representations from the complainant could constitute a defence to the offence of defilement - Sexual Offences Act, No. 3 of 2006, section 8(5).

**Criminal Law** - defilement - proof of the commission of the offence of defilement - ingredients of the offence of defilement - age of the Complainant, identity of the perpetrator and penetration - effect of representations from the complainant, at the time of the commission of the offence, that she was an adult capable of marriage - Sexual Offences Act, No. 3 of 2006, sections 8(1), 8(3) & 8(5).



## **Brief facts**

The accused was convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. He was accused of intentionally causing his penis to penetrate the vagina of a child aged 15 years.

On July 27, 2014, the complainant went to the barber shop where she got shaved and was seduced by the accused after the shaving. She went back to the barber shop on August 7, 2014 and talked to the accused and went with him to his house where they had protected sex. On August 16, 2014 she had sex again with the appellant at 11 a.m. When she went home at 7 p.m., she was sent away by her sister who demanded to know where she was. The complainant went back to the appellant's house where she cooked, stayed overnight and had sex with the appellant. In the morning, the complainant's sister, father and the appellant came to the house. They were arrested by vigilantes and taken to police custody for a day and later underwent medical examination.

## **Issues**

1. What were the ingredients to the offence of defilement?
2. Whether the fact that a complainant presented herself as an adult capable of marriage was a defence to the offence of defilement.

## **Held**

1. The ingredients of the offence of defilement were well-established. They included proof of the age of the victim, the identity of the perpetrator and penetration.
2. The complainant's birth certificate was produced. It was shown that at the time of the commission of the offence, she was 15 years old.
3. The evidence of PW1, PW2 and PW3 placed the appellant at the scene of crime. Evidence which showed a clear chronology of events, including the fact that the complainant was found at the appellant's house, was tendered. There was no doubt that the appellant engaged in sexual intercourse with the complainant on several occasions.
4. The complainant's conduct showed that she knew that what she was doing was wrong. Despite warnings from her sister she persisted in going to the appellant's house. She stayed and cooked at the house twice.
5. It was a defence to the offence of defilement, under section of the 8(5) of the Sexual Offences Act, to show that the complainant deceived the accused person by stating that he/she was an adult or that the accused reasonably believed that the complainant was an adult. For purposes of the defence, it was necessary, while having regard to all the circumstances of the case, to establish any steps that the accused took to establish the age of the complainant.
6. There was no reason to believe that the appellant did not believe that the complainant was underage. There was nothing to show that the appellant took steps to ascertain whether the complainant was below 18 years of age.
7. With the existing dietary system some juveniles were known to grow physically and appear to be adults while in fact they were minors. Therefore, the judicial system and officer ought to be wary but at the same time protect innocent accused persons. Each case ought to be treated independently.
8. Part of the complainant's conduct was that she presented herself as an adult who was capable of marriage. The appellant would therefore be granted the benefit of doubt and be released unless lawfully held.

*Appeal allowed.*

## **Citations**

### **Statutes**

1. Sexual Offences Act, 2006 (Act No 3 of 2006) — section 8 (1) (3) (5) — Interpreted



## Advocates

None mentioned

## JUDGMENT

1. The appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on diverse dates between July 28, 2014 and August 18, 2014 at [particulars withheld] within Trans Nzoia County, intentionally caused his penis to penetrate into the vagina of NNW a child aged 15 years.
2. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No 3 of 2006. The particulars were that on diverse dates between July 28, 2014 and August 18, 2014 at [particulars withheld] within Trans Nzoia county, intentionally caused contact between his genital organ (penis) and genital organ (vagina) of NNW a child aged 15 years.
3. The appellant was convicted and sentenced hence this appeal. The facts as presented in trial court can be summarised as hereunder.
4. PW1 the complainant testified that she was born on January 28, 1999 and was class 8 pupil at [particulars withheld] primary school. She said that on July 27, 2014 she had gone to shave at a place called [particulars withheld] at the barber shop which belonged to the appellant. He seduced her after the shaving. On August 7, 2014 she went to the same barber shop and after talking to the appellant they went to his house at crossroads where they had protected sex.
5. On August 16, 2014 she had sexual intercourse again with the appellant in his house at 11 am. When she went home at 7pm her sister whom she was staying with send her away after demanding to explain to her where she was. She went back to the appellant's house and she stayed overnight. She even cooked and ate supper. They had sexual intercourse that night.
6. She slept but in the morning her sister, her father and the appellant came to the house. They were then arrested by some vigilantes and taken to the police custody at Kitale for a day and was taken for medical examination later.
7. PW2 JNW the sister to the complainant testified that her daughter F had seen the complainant at the barbershop at 6pm. She had disappeared that day. Later she found the children whom she had left with the complainant alone whom she (the complainant) had left after lunch.
8. Again she came back and found her missing after she quarrelled her. She tried looking for her in her in laws place but was not there. She called her father but she had not gone home. She called one M who managed to trace the appellant and they showed her where the complainant was. They knocked the door and they found the complainant inside the appellant house. They then forwarded the matter to the police. The complainant was taken to the hospital for treatment.
9. PW3 MWM the father of the complainant testified on how he was called by PW2 concerning the disappearance of the complainant. They called M using his phone who told them that the complainant was at the home of the appellant. They went to his house and found the complainant who had locked herself inside the house. They went to the Chief's Office and later to Kitale police station.
10. PW4 Linus Were a Clinical Officer from Kakamega District Hospital examined the complainant and found that her hymen was torn and old looking with whitish substance. She concluded that she had premature sexual intercourse. He produced the P3 form.



11. PW5 PC Michael Muchir carried out the investigation after receiving the appellant and the complainant. He recorded statement and preferred charges against the appellant.
12. When put on his defence the appellant denied the charge. He said that 4 people went to his barber shop on August 18, 2014 and ordered him to accompany them to [particulars withheld]. They met one Moses on the way who said that he was the one they were looking for. They went to the chief's office and thereafter taken to Kitale police station and placed in the cells. He was later charged with the offence which he continued to deny.

### **Analysis and Determination**

13. This court has perused the proceedings herein as well as the written submissions by the parties. The ingredients for the offence herein are now well settled, namely, the age of the victim must be established, the identity of the perpetrator and that penetration must be proved.
14. The appellant's grounds of appeal in his petition dated April 13, 2016 are general in nature and the substance thereof is that the case was not proved beyond reasonable doubt as there was no corroboration of the same.
15. There is no dispute that the birth certificate produced and which was not contested showed that the complainant was 15 years old at the time of the commission of the offence.
16. The totality of the evidence presented by PW1, PW2 and PW3 clearly placed the appellant at the scene. PW1 gave clear chronology and sequence of events including her last place where she was found, namely, the appellant's house. Infact I have no doubt that she engaged herself in sexual activity severally with the appellant. The defence presented by the appellant apart from being unsworn was clearly a sham.
17. The learned state counsel Mr Kakoi has submitted that despite the offence being proved, against the appellant, this was a classic case where section 8(5) of the Sexual Offence Act apply.
18. The same states as follows;  
8(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 year 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 the circumstances, including any steps that the accused person took to ascertain the age of the complainant." (emphasis mine)
19. Having looked at the conduct of the complainant it appears that despite her age, she knew what she was undertaking to be wrong. It appears that despite warning from PW2 her sister severally, she insisted and persisted in going to the appellant's house.
20. This circumstance included her staying and cooking in the appellant house twice. Infact by agreeing to lock herself in the house till she was found by her father and PW2, clearly manifested her intention of staying with the appellant.
21. It is true that the appellant an adult lured her into committing the sexual act. I however do not see any reason to find that the appellant did not believe that the complainant was underage. Obviously, from



the facts on record, there is nothing to show that the appellant took any steps to ascertain that she was below 18 years.

22. Although this line of argument seemed to have obtained in this case, the same ought to be treated very carefully and each case ought to be determined on individual basis. It should not be a blank cheque for the offender to pull whimsically. It is appreciated that with the current dietary system some juveniles are known to have grown physically and appear to be adults, but yet they are minors. The judicial system and officer ought generally to be wary but at the same time protect innocent accused persons. In summary each case ought to be treated independently.
23. Consequently in view of the complainants conduct I think all along, she presented herself as an adult who was capable of marriage. It is not clear whether the appellant was a class 8 pupil. No evidence was presented to the court.
24. In the premises, and based on this ground alone the appellant is granted the benefit of doubt. The appellant is hereby released unless lawfully held.

**DELIVERED. SIGNED AND DATED AT KITALE THIS 12<sup>TH</sup> DAY OF APRIL, 2018.**

---

**H.K. CHEMITEI**

**JUDGE**

**12/4/18**

**In the presence of:**

Mr Kakoi for the State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.

