



REPUBLIC OF KENYA



**Emodo v Republic (Criminal Appeal 89 of 2023)
[2025] KEHC 1630 (KLR) (Crim) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 89 OF 2023
CM KARIUKI, J
FEBRUARY 6, 2025**

BETWEEN

GILBERT OMELA EMODO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with an offence of defilement contrary to Section 8(1)(4) of *Sexual Offences Act* No. 3 of 2006 Laws of Kenya. Particulars being that, on the diverse dates of 14 and 11th August 2022 at unknown Time within Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of LWW a girl aged 17 years old.
2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 Laws of Kenya. The particulars were that on diverse dates of 14th and 15th August 2022 at Unkown time within Nyandarua county, intentionally and unlawfully caused his penis to penetrate the vagina of LWW, a girl aged 17 years.
3. The Appellant pleaded not guilty, and the matter went to full trial. He was found guilty of the main charge and sentenced to ten (10) years imprisonment.
4. Aggrieved by the verdict, the Appellant lodged the instant appeal. The main ground of appeal was on his defense under Section 8(5) 1a and (b) of being deceived that the victim was over 18 years of age at the time of intercourse and believing so reasonably.

Directions of the Court.

5. The appeal was canvassed orally. The Appellant also opted to file his written submissions.



Analysis and Determination.

Court's duty

6. First, the appellate Court is obligated to re-evaluate the evidence and make its conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32.
7. This Court has considered the grounds of appeal, the evidence adduced in the trial court, the respective parties' oral submissions, and the Appellant's written submissions. The main issues for determination are;
 - i. whether the Appellant's defense was considered and;
 - ii. whether the defense is merited.
8. Elements of the offence of defilement
9. The Appellant was charged with the offense of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act*, which provides:

“8(1) a person who commits an act which causes penetration with a child is guilty of an offense termed defilement.

8(4) "A person who commits an offense of defilement with a child aged sixteen and eighteen years is liable upon conviction to be sentenced to imprisonment for a term of not less than fifteen years."
10. The specific elements of the offense of defilement arising from Section 8 (1) of the *Sexual Offences Act*, which the prosecution must prove beyond a reasonable doubt, are:
 - 1) Age of the complainant;
 - 2) Penetration in accordance with Section 2(1) of the *Sexual Offences Act*, see *Mark Oiruri Mose v R* [2013] eKLR; and
 - 3) The accused was the assailant.
11. See the case of *Charles Wamukoya Karani Vs Republic*, Criminal Appeal No. 72 of 2013.
12. The ingredients of the offense of defilement were not contested; however, the Appellant raised a defense under section 8(5) of the *Sexual Offences Act*.
13. The Act provides as follows in sections 8(5) and (6):
 - (5) It is a defense to a charge under this section if-
 - (a) it is proved that such a 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 offense 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."



14. Section 8(5) of the [Sexual Offences Act](#) stated that it was a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years old.
15. The accused's sworn evidence was to the effect that he met the victim on 6/7/2020 at Njabini Rusenga Stadium and got to know each other. He asked her several questions before getting into a relationship with her. He asked for her ID card, and she said she left it at their home. She confirmed she was an ID card holder and had finished school in 2020. He guessed she was between 20 - 22 years of age. They decided to have a relationship. He felt confident he was dealing with an adult – she was confident she had no fear at all. She would get annoyed if he asked her what she deemed childish questions. She was big-bodied, and he was confident she was an adult. No one could tell she was a child. He confirmed having had sex on the 13th and 14th of August 2022. He left his house and traveled to Nairobi. She left her, preparing to go to their home. She spent Sunday night at his place until Monday. She was freely in his home and could freely move as he never locked her in.
16. The defense concurs with the victim's testimony that she voluntarily went to the Appellant's place and stayed for 4 days. She told him that she was an adult. The evidence of PW 1 – 5, as it concerns the accused and victim event leading into the Act constituting the defilement, is not contested by the Respondent. However, the core contest is the fact that the trial court ignored and/or did not analyze the defense tendered, which is anchored on the provisions of Section 8, 5 (a) and (b) of the [Sexual Offences Act](#) No. 3 of 2006 of the Laws of Kenya.
17. Thus, the Court will interrogate whether the provisions cited and the evidence tendered to validate the defense of the Appellant. The defense raised by the Appellant sees Section (8) (5) (a) (b) and Section 6 [Sexual Offences Act](#) No. 3 2006 Laws of Kenya.
18. Section 42 of the [Sexual Offences Act](#) provides that "A person consents to he/she agrees by choice, and has freedom and capacity to make that choice. i.e., in the absence of coercion or deceit. Capacity refers to age and mental ability."
19. It is not disputed that consensual sex is lawful in Kenya; thus, it is incumbent upon the accused to establish the defense stipulated in Section 8 (5) (a) and (b) and establish that under Section 6 of the same Act, the steps he took to ascertain victim as not a minor. The victim admitted she was an adult, had ID, and had left it at home. She is said to be of big body and voluntarily entered into a relationship in which sexual intercourse was undertaken.
20. The Appellant, having established so, it was incumbent upon the prosecution to rebut the aforesaid defense. The defense under Section 8 (5) (a) and (b) and sub-Section (6) is supposed to establish the degree of probability the action taken by the Appellant to believe the victim was of age. The trial court ignored the fact that the burden on the appellant side was to prove on a balance of probability his defense but instead shifted the same to the Appellant by indicating that the Appellant did not do due diligence in engaging with the victim in the act subject of charges.
21. The burden of proving that deception or belief fell upon the Appellant, but the burden was on a balance of probabilities to be assessed on the basis of the Appellant's subjective view of the facts. Thus, whereas indeed the complainant lived with her mother and sister, that alone would not rule out a reasonable belief that she would be over 18 years old. See the case of [Wambui v Republic \(Criminal Appeal 102 of 2016\)](#) [2019] KECA 906 (KLR) (22 March 2019) (Judgment).
22. In the case of [Meshack Nyongesa V Republic](#) [2016] EKLR, the Court of Appeal had to consider the defense under Section 8(5) of the SOA and stated: 10. Section 8(5) of the [Sexual Offences Act](#) provides a complete defense to a charge of defilement if it is shown that the accused believed that the child



was 18 years or above. The learned Judges went on to state:11. We take judicial notice of the fact that these days, children, especially females, appear older than they actually are. In the circumstances, given the fact that this is a defense that few non-lawyers know about, it is our considered view that when a young man is charged with defiling a girl child above the age of 16 years, the trial court should ascertain whether he had reason to believe that the girl was 18 years or above.

23. For the reasons set out herein, this Court finds that the Appellant's conviction was not safe given the full circumstances of the case.
24. Thus, the Court makes the following orders;
 - i. The appeal is allowed, the conviction is quashed, and the sentence is set aside.
 - ii. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION THIS
6TH DAY OF FEBRUARY, 2025.**

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**CHARLES KARIUKI
JUDGE**

