



**Kweyu v Republic (Criminal Appeal E039 of 2023)
[2025] KEHC 1593 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E039 OF 2023
PJO OTIENO, J
FEBRUARY 21, 2025**

BETWEEN

BENARD SOLOCHI KWEYU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentencing of Hon. M. A. Onyango (SRM) in Mumias SPMC SO Case No. E029 of 2021 delivered on 12th July, 2023)

JUDGMENT

1. The appellant was arraigned before the Senior Resident Magistrate at Mumias in Sexual Offences Case No. E029 of 2021 charged with the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between the night of 2nd and 3rd August 2021 at Matungu subcounty within Kakamega County, the appellant intentionally caused his penis to penetrate the genital organ (vagina) of ROI a child aged 15 years.
2. In the alternative, the appellant was charged with the offence of indecent act with a child contrary to section 11(1) of *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between the night of 2nd and 3rd August 2021 at Matungu subcounty within Kakamega County, the appellant intentionally touched the vagina of ROI a child aged 15 years.
3. The appellant pleaded not guilty to the charge and the case proceeded to full trial with the prosecution calling a total of four (4) witnesses whose evidence can be summarized as below;
4. The court conducted voire examination on PW1 and upon being satisfied on her ability to tell the truth she gave sworn evidence and testified that she was 16 years old and a student at [Particulars withheld] Girls. She narrated that she had been friends with the appellant for four months and that he had known him during the corona period while selling chips at Mayoni. She recounted that on 8/2/2021 at about



8PM she went to the Mayoni to shave her hair and since there was a black out, she sat at the premise of a woman selling chips. The appellant riding in a boda boda spoke to the woman then the woman asked her to board the boda boda which she did. They then proceeded to the appellant's house where they ate and later had sex. He left the appellant's house after two days and on leaving, the appellant gave her phone. He used the phone to call a friend called Sultan and went to his place where he stayed for two days but he did not have sex with him. The appellant then called her to visit him and on her way there she was arrested. She further stated that she was not forced to have sex with the appellant and proceeded to produce her birth certificate which showed that she was born on 11/11/2005. She also identified in court her sweater which was recovered in the appellant's house by her brother.

5. PW2 testified that he was the complainant's brother and that on 2/8/2021 he returned home from work and was told by his siblings that they went to the barber with the complainant but the complainant had not returned home. One of them said that he heard a woman at the Busia stage talking to the complainant who called someone whom she told that the girl was there and that he should send a motorcycle.
6. The following day their mother was told that the complainant was seen with the appellant whom they knew as "Karim". They reported the incident with the police and later went to the appellant's home where he found the complainant's sweater and the appellant confirmed that the complainant was at his house and that she had left with his phone. They called the complainant who told them where she was and police proceeded to arrest her. He further stated that he knew the appellant as "Karim" and that he worked at the Busia stage.
7. PW3 testified that he was a clinical officer at Matungu Hospital and that he had examined the complainant on 7/8/2021. The examination revealed that her vagina had no bruises, the hymen was missing and there was no discharge. The lab examination showed the presence of epithelial cells and VDRL was negative. He also examined the appellant whose VDRL was negative.
8. PW4 testified that he was the investigating officer to whom on 3/8/2021, a report was made by the complainant's brother the report was that the complainant, who was a minor, was missing. A search was conducted and it was established that the girl was seen in the house of the appellant. On 6/8/2021 they went to the appellant's home where the appellant and the complainant were arrested.
9. On cross examination he stated that the appellant started a relationship with the minor in April and that they had sex in August for the first time.
10. The evidence of PW4 marked the close of the prosecution case with the court ruling that a prima facie case had been established and the accused person was put on Defence.
11. At the defence hearing, the appellant testified as DW1. It was his sworn evidence that he was a turn boy who he had been friends with the complainant for six months. He stated that the complainant had disclosed that she was 21 years old and he wanted to take her in as his wife. He claimed that the complainant was big and there was nothing to show that she was a student. He added that he stayed with the complainant for two days and had introduced her to his parents.
12. On cross examination he reiterated that he was in a romantic relationship with the complainant.
13. DW2 testified that she was the appellant's mother and recounted a time the appellant brought a girl home and he told her he wished to marry her having known her for six months. She stated that the girl looked big enough to be a wife. That marked the close of the defence case.
14. In a judgment of the trial court delivered on 12th July, 2023, the appellant was found guilty and convicted for the main count and sentenced to five (5) years imprisonment.



15. Dissatisfied with the judgment of the trial court, the appellant has lodged a petition of appeal dated 31st July, 2023 seeking to have his conviction quashed and sentence set aside. The appeal is premised on the following grounds;
- a. That the trial magistrate erred in law and the facts surrounding this matter by failing to put into consideration the appellant's evidence which led to a miscarriage of justice.
 - b. That the trial magistrate failed to establish beyond reasonable doubt on the part of the respondent that indeed the complainant was a virgin before she slept with the appellant.
 - c. That the trial magistrate failed and erred on her part that the respondent had also failed to establish that the complainant in this matter never slept with the 3rd party before she was arrested by the police.
 - d. That the honourable magistrate failed to establish on the part of the respondent, if the 3rd party whom the complainant in this case was found with was arrested or appeared in court as a state witness.
 - e. That the trial magistrate failed to admit that the complainant in this case was not a school going child and she was out of control of her parents.
 - f. That the trial magistrate failed to consider the evidence adduced in court by the appellant's advocate that the complainant was a married woman with one child as the case was still in court.
 - g. That the trial magistrate and the respondent herein failed on their part to consider the evidence adduced in court by the investigating officer that the appellant and the complainant were arrested from the appellant's office.
 - h. That the trial magistrate failed to put on record that the evidence adduced in court and instead blamed and jailed the appellant for a five-year term sentence.
 - i. That the trial magistrate failed on her part, no exhibits nor medical report produced in court to substantiate that indeed the appellant raped the complainant in this matter.
 - j. That the honourable magistrate and the respondent should be condemned by being biased in their findings and find the judgment delivered against the appellant was a natural decision and not from material facts adduced in court.
 - k. That the trial magistrate condemned the appellant and failed to justify that indeed the complainant in this matter in particular the parents also failed in their role as to take care of the complainant who is peacefully married as the appellant is now serving a five-year jail term.
16. The appeal was canvassed by way of written submissions and the court will just give a summation of what each side has offered.
17. It is the submission by the Appellant that the complainant was not a virgin and that the prosecution failed to call a crucial witness that is, the lady who linked up the complainant with the appellant. He further adds that the complainant voluntarily had sex with him and that he wanted to marry her.
18. For the respondent it is submitted that the prosecution proved the three elements of defilement that is age, penetration and positive identification of the appellant. They submit that their only disapproval with the judgment is whether the trial court correctly interpreted section 8(5) of the [Sexual Offences Act](#) which provides that it is a defense to a charge under the section if it is proved that a child deceived an accused person into believing that he/she was over the age of eighteen years at the time of commission



of the offence and that the accused reasonably believed that the child was over the age of eighteen years. They submit that the complainant during her cross examination stated that the accused knew she was a big girl and that she agreed to have sex with the accused because they were in a relationship. For this reason, they submit that the trial court wrongly applied the law and are therefore conceding to the appeal.

Analysis and Determination

19. This court having considered the grounds of appeal, the proceedings of the lower court and the submissions by both the appellant and the respondent and discerns the issue for determination to be whether the complainant deceived the appellant into reasonably believing that she was an adult.
20. The critical elements of the offence of defilement being the age of the victim, penetration and positive identification of the perpetrator was not disputed in this case. Infact the both complainant and Appellant readily admitted having had sex.
21. The only contention that is whether the trial court considered the defence given by the appellant that he believed the complainant was an adult and that she carried herself as one.
22. Section 8(5)(a)(b) of the *Sexual Offences Act* No. 3 of 2006 provides as follows:

“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.”

23. Section 8 (6) of the *Sexual Offences Act* further provides that:

“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.”

24. The above provisions were elucidated by the court of appeal in the case of *Eliud Waweru Wambui v Republic* [2019] eKLR where it was held as follows;

“Subsection (5) states that it is 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. We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two sub-sections are to make sense.

We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years



old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.”

25. As to who bears the burden of proof in such circumstances, the High court in Migori in the case of Irene Atieno Ochieng vs Republic (2017) eKLR held that:-

“Whenever the accused opts to rely on the defence under section 8(5) of the *Sexual Offences Act*, the evidential burden of proof shifts to that accused person to satisfy the conditions attached to that defence. It therefore remains the duty of an accused person to demonstrate that:-

- a. That it was the child who deceived the accused person into believing that he/she was over the age of 18 years at the time of the alleged commission of the offence;
- b. That the accused person reasonably believed that the child was over the age of eighteen years; and
- c. That when all the circumstances are brought on board and duly interrogated, they point to the conclusion that the belief on the part of the accused person was reasonable.

26. The court’s understanding of the above position is that the burden of proving deception by the complainant lies with the Appellant. However it is worth noting that the said burden is on a balance of probabilities and is to be assessed on the appellant’s subjective view of the facts.

27. In the circumstances, the evidence by the complainant was that she came to know the Appellant during the corona period. The complainant at the time was selling chips at Mayoni. On cross examination she stated that though she never disclosed to the appellant that she was a big girl, the appellant knew that she was a big girl and that they were in a relationship.

28. The complainant had spent two nights at the appellant’s place and had even got to meet his mother and his sister’s children. After the two-days spent at the Appellants, the complainant deceived the appellant for having relocated back to her parents but instead proceeded to her friend’s place called Sultan and where she did spend 2 days. Her reason was that her parents would discipline her though she never disclosed the same to the Appellant.

29. Further, the appellant’s mother who testified as DW2 did indicate that the complainant appeared to be a big girl and that the appellant even had the intentions of marrying her.

30. The complainant at trial admitted that she had had sex before with other people and had been in a relationship with the Appellant for four months before they had sex. This was confirmed by the evidence of the clinical officer, PW3, who examined the complainant and found her hymen missing with no bruises or discharge. On cross examination, she indicated the minor’s hymen had been broken but not recently proximate to the time of occurrence of the alleged defilement incident by the Appellant. The complainant is also stated to have been with one child and who was sired by another person before she met the Appellant.

31. The trial court when addressing the issue of deception under Section 8(5)(a)(b) of the *Sexual Offences Act* in the last paragraph of its judgement noted as follows;

“The above section provides that it must be proved that the said child deceived the accused into believing that she was over 18 years old. The evidence before court is that PW1 stated



that she knew the accused knew she was a big girl. The accused in his defense alluded to the fact that PW1 was not even going to school and that she used to sell chips at Mayoni. The said issue of not going to school and/or selling chips was not raised with the witness at the time of hearing. I find the defense was an afterthought as the issues being raised were not put to PW1 to confirm before court...’

32. ‘Deceit is in common parlance defined’ as the act of deliberately causing (someone) to believe something that is not true or (of a thing) given a mistaken impression.
33. With due respect to the trial magistrate, the parameters which ought to have deeply considered in the instant case was whether the appellant proved acts of deception by the minor with respect to her age.
34. The trial court was wrong in holding that the appellant never proved to have been deceived by the complainant and further, that being the appellant never raised at the trial, the issue of the minor not having been going to school or was selling chips when they got to know each other, the same remained an afterthought.
35. The court holds that deception herein would have been by way of words or actions of the minor so long as the appellant reasonable believed the complainant was an adult and all circumstances when brought on board and interrogated pointed to the conclusion that the belief of the Appellant was reasonable, such would also amount to deception.
36. First, on the issue that the Appellant never contended of the complainant having been selling chips, the court notes that the position came out clear in the evidence of the minor at trial and the court ought to have considered the evidence before it in entirety. The complainant having considered herself a big girl, it was important for the trial court to have noted her body size and general mien. That was not done. The court should also have taken its time to find out if the girl was indeed school going. That was also not done.
37. However that the appellant said that the girl told him that she was 21 years old ought to have been considered. The trial court duly captured the evidence that the appellant was told by PW1 that she was 21 years old but the court did not put that into consideration. When that fact and the body size of PW1 is taken into account the court finds that the appellant had a reason to believe PW1 was not a minor.
38. Secondly, when the totality of the evidence is brought on board, the inference by any reasonable person would be that the complainant, though a minor, acted and behaved as if she was a person of age. She even confessed that the Appellant did not force her to have sex, the sex was consensual having been in a relationship with the Appellant for four months she was proud to announce that she was a big girl. At all times, the complainant must have believed their relationship would lead eventually to a successful marriage owing to the fact that the Appellant had even introduced her to his mother.
39. Aware of the fact that not only by looks would the Appellant proceed to believe that the complainant was an adult, the fact however of the complainant appearing a mature woman was evident to everyone including the Appellant’s mother and whom she was introduced to as the to-be daughter-in-law. In addition the fact of the Appellant having had a kid prior to knowing the Appellant has not been disputed and was not taken into account.
40. Finally, this court in interrogating all the evidence adduced during trial, arrives at the irresistible conclusion that the belief of the Appellant was reasonable under the circumstances. The complainant by her conduct and action specifically led the Appellant to believe that she had attained the age of majority. The evidence by the appellant was sufficient in the circumstances of the case, to make it



probable that the complainant looked and appeared an adult which doubt must be resolved in favour of the appellant.

41. The court finds that the evidence by the defence in court was never given the due regard and that had it been properly treated it was enough to point at a probability of the complainant appearing and behaving as an adult thus availing to the appellant the defence under section 8(5) of the defence.
42. Accordingly, for the reasons set out above, this appeal succeeds and it is allowed. The conviction is quashed and sentence set aside. Let the appellant be forthwith set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF FEBRUARY, 2025.

Patrick J O Otieno

Judge

