



**Kaburu v Republic (Criminal Appeal E071 of 2023)
[2025] KEHC 1714 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1714 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E071 OF 2023
CJ KENDAGOR, J
FEBRUARY 14, 2025**

BETWEEN

KENNETH MUTUMA KABURU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence arising in Nkubu Law Courts Sexual Offences case number E003 OF 2021 delivered on 10th May, 2023 by Hon. E. Ayuka P.M)

JUDGMENT

1. The Appellant, Kenneth Mutuma Kaburu, was charged and convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the charge were that on the 3rd and 5th September, 2020 at around 1100 hours at [Particulars Withheld], Meru County, the Appellant intentionally caused his penis to penetrate the vagina of B.G., a child aged 15 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). The particulars of the alternative charge were that on the 3rd and 5th September, 2020 at around 1100 hours at [Particulars Withheld], Meru County, the Appellant touched the breasts of B.G., a child aged 15 years, with his penis.
3. The Appellant pleaded not guilty, and the case proceeded to full trial, with the prosecution calling five witnesses. The Appellant testified in his defence and did not call any witnesses.
4. At the conclusion of the trial, the learned trial magistrate found the Appellant guilty. He was convicted on the main charge and sentenced to 15 years imprisonment. Dissatisfied with both the conviction and the sentence, he appealed to this court by way of a petition of appeal, later amending the grounds to include five specific points as follows:



1. That, the learned trial magistrate erred in matters of law and facts by failing to note that the prosecution did not prove their case to the required standards of proof as required by the law. Since no evidence was adduced to prove the paternity of the complainant's child, a DNA test was needed to prove beyond reasonable doubt that the Appellant was the father of the complainant's child.
2. That, the learned trial magistrate erred in law and fact by failing to inform the appellant his right of representation was enshrined under Article 50 (2)(g)(h) of *the Constitution*; thus, the Appellant was not accorded a fair trial.
3. That, the learned trial magistrate erred in law and fact by failing to note that the prosecution failed to prove their case beyond reasonable doubt according to the law.
4. That, the learned trial magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under Section 8 (4) of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion in sentence not to impose an appropriate sentence in an appropriate case based on the scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and unfair in breach of Article 27 (1) (2) (4) of *the Constitution* of Kenya. Hence, the sentence imposed on the Appellant is unlawful.
5. That, the trial magistrate erred in both matters of law and facts by failing to consider the Appellant's defence.
5. The parties relied on their written submissions at the appeal hearing. The Appellant submitted that the prosecution's evidence lacked credibility, was inconsistent and contradictory, and could not sustain a conviction. He also submitted that the subsequent sentence was inappropriate and excessive. In his supplementary submissions, he critiqued the notice of enhancement submitted by the prosecution.
6. The Respondent asserted that the case was proved beyond reasonable doubt and that the conviction was safe. They applied for an enhancement of the sentence via a Notice dated 10th September, 2024.
7. The Complainant gave her age as 16 years old. She stated in Court that she was staying at her aunt's house when the Appellant, her boyfriend whom she had known for approximately four months, came to visit her. He then took her to his place on 3rd September and 5th September, 2020. She stated that on two occasions, they had sexual intercourse at his place, after which she would return home. She testified that upon returning to Nyeri, she discovered that she was pregnant and went back to her aunt's home, where the matter was escalated to the chief and subsequently to the police station, leading to the Appellant's arrest and charge.
8. PW2 was the aunt with whom the Complainant was residing with. She testified that the Complainant was her niece and that the Complainant was attending school from her home. She became aware of the pregnancy when she called to inquire why the Complainant had not returned to school. She stated that the Complainant eventually came back to her house, and she reported the matter to the chief, who interrogated the Complainant and escalated the issue to the police.
9. PW3 served as the Assistant Chief of the [M] Sub-location. He stated that he received a report regarding the Complainant's failure to return to school. The Complainant explained that she was pregnant and led them to the Appellant's home, whom she claimed was responsible for her pregnancy. He stated that, based on that information, he escorted the Complainant and the Appellant to the police station.
10. The investigating officer presented the birth certificate and indicated that she accompanied the Complainant to hospital, where an ultrasound revealed that the pregnancy was 13 weeks.



11. PW5 was a clinical officer at the medical facility where the Complainant was treated. He produced the treatment card, P3 form, ultrasound report, and lab form. According to PW5, a history of defilement was provided.
12. The Appellant, in his defence, denied the charge and stated that prior to the incident, he did not know the Complainant; he maintained that the charges were framed up.
13. I have examined the record, re-evaluated the facts, and drawn independent conclusions per the principles enunciated in the authorities of *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32, and *Felix Kanda v Republic, Eldoret, High Court Criminal Appeal 177 of 2011* [2013] eKLR.
14. I have considered and analyzed the evidence tendered in the trial Court by the prosecution and the Appellant, the grounds of appeal, and the written submissions by the parties herein. The issues for determination are two pronged;
 - I. Whether the prosecution proved their case to the required
 - II. Whether the sentence was appropriate.
15. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. To prove the offence charged, the prosecution must establish beyond reasonable doubt all the elements of defilement as was stated in the case of *George Opondo Olunga v Republic* [2016] eKLR that the ingredients of an offence of defilement are:
 - i. Age of the victim
 - ii. Penetration
 - iii. Positive identification of the perpetrator
16. The Complainant's information regarding her age aligns with the birth certificate submitted in Court. On the relevant dates, she was four days short of her 16th birthday.
17. From the evidence presented, I am convinced that the Complainant and the Appellant were in a relationship; the Complainant stated it lasted for approximately four months. The Complainant detailed their romantic involvement. Testimonies from the chief and her aunt, with whom she lived with at the time, confirm that the Appellant was a neighbourhood resident. During the interrogations, the Complainant took them to the Appellant's home. Notably, there was no mention of any other individual, which further reinforced the notion of their intimate association. There was neither malice nor guessing. The trial Court, in its judgment analysing the evidence presented, stated that there was no room for mistaken identity in the case. I agree with that analysis.
18. The Complainant stated that he took her to his home, where they engaged in sexual intercourse. Her testimony regarding the sexual intercourse was clear, and I am convinced that she implied penetration of the vagina with the penis. As she was a minor, she was incapable of giving consent.
19. The Complainant was confirmed to be pregnant following the medical examination. Aside from the scans indicating that she was approximately thirteen weeks pregnant at the time of the examination, there were no other notable findings from the physical examination of the vagina. The examination took place on 14th January, 2021.
20. At the time she testified, she had not given birth. The Appellant contested the assertion that no DNA testing was performed. While it is appropriate for DNA testing to be conducted, a conviction for sexual



offences can rest solely on the evidence of the Complainant if the Court finds that the Complainant's evidence is credible. I place reliance on *Aml V Republic [2012] Eklr (Mombasa)*, *Fappyton Mutuku Ngui V Republic (2014)Eklr*, *Kassim Ali V Republic [2006] Eklr*.

21. In addition, I evaluated whether the circumstances justified requesting additional evidence under Section 358 of the *Criminal Procedure Code* to obtain DNA. I considered the evidence that had been presented and whether introducing this DNA evidence, along with other evidence during the trial, could have created reasonable doubt about the Appellant's guilt in the minds of the Court. Ultimately, I conclude that there was no doubt regarding the Appellant's guilt.
22. The ingredients of the offence of defilement contrary to Section 8 (1), as read with Section 8(3) of the *Sexual Offences Act*, were proved to the required standard beyond reasonable doubt, and the conviction was safe.
23. The Appellant was sentenced to 15 years in prison. Section 8(3) of the *Sexual Offences Act* prescribes a minimum sentence of 20 years for a convicted person guilty of defilement involving a child between the ages of twelve and fifteen years. The Complainant was four days short of her sixteenth birthday as of the first incident on 3rd September, 2020. As a result of this interval, after considering the prosecution's application for a sentence enhancement, I hereby reject the application.
24. The upshot is that the appeal on conviction and sentence is hereby dismissed. It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI through the Microsoft Teams Online Platform on this 14th FEBRUARY, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Appellant: Kenneth Mutuma Kaburu

Respondent: Mr. Omondi, ODPP

