



**Barng'etuny v Republic (Criminal Appeal E058 (E061) of 2024)
[2025] KEHC 4203 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E058 (E061) OF 2024**

RK LIMO, J

APRIL 3, 2025

BETWEEN

JIMMY ROTICH BARNG'ETUNY APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein Jimmy Rotich Barngetuny was charged with the offence of defilement contrary to section 8(1) as read with 8(3) of *Sexual Offences Act* No.3 of 2006.
2. The particulars of the offence were that on diverse dates between March to November 2020 at Trans-Nzoia County intentionally and unlawfully caused his genital organ namely penis to penetrate into the genital organ namely vagina of E.C. a child aged 12 years.
3. He also faced an alternative charge of Committing an Indecent Act with a child contrary to section 11(1) of *Sexual Offences Act*. The particulars were that on diverse dated between March-November 2020 at Trans-Nzoia he intentionally and unlawfully touched genital organ namely vagina of E.C a child aged 12 years.
4. The trial court after trial found that the evidence tendered was insufficient to sustain the principal charge of defilement but found that there was sufficient evidence to sustain the alternative count of Committing an Indecent Act with a child and convicted him sentencing him to serve 10 years imprisonment.
5. The appellant felt aggrieved and filed this appeal against the conviction and sentence. The Respondent has conceded to this appeal. However this court has gone through the proceedings from the trial court and finds that there is a possibility that a miscarriage of justice may have been occasioned not just to the complainant but the appellant as well. The reasons for my findings are as follows;-



- i. Going by the evidence tendered by the complainant PW1 on 30/8/2022 it is quite apparent that the minor suffered some inability of some sort because of either confusion which is clearly captured or was a slow learner. The trial court captures the demeanor of the witness as follows;-
“the witness has no sense of time or age of her child”.
 - ii. The age of the child born as a result of the criminal charge against the appellant was not ascertained. The trial court captured her age in the proceedings to be “crawling stage”. In light of the defence put forward which I will not go into at this stage, it was necessary and in the interest of justice to ascertain the age of the child given that the complainant could not tell the exact date she gave birth.
 - iii. This court has also noted from the proceedings that Mr. Wekhuyi Advocate for the complainant requested for a DNA to be conducted on the child, the mother and the appellant to establish the question of paternity. The trial court in its ruling on 22/1/2024 declined the application holding that it was not necessary. That finding was erroneous and unfair because without the DNA results it would be difficult to ascertain the claims by the appellant that he was being framed by his brother and neighbours for ulterior motives. In situations where a child is born as a result of defilement or any other unlawful sexual engagement, and there is a denial by the offender, it is necessary to subject the child to DNA analysis to bring the matter to rest.
6. This court notes that the trial court gave latitude to the defence to get additional evidence on 6/8/24 by calling the Registrar of Births and Deaths who later came and testified. The same was fair and anchored in Law (Section 150 of C.P.C). It was to help the trial court clear the air with respect to the defence claims that the birth certificate (PExhibit 1) was not genuine. The same latitude should also have been applied with respect to the defence’s application for DNA analysis to be conducted on the child born out of the alleged criminal act.
 7. The refusal by the trial court to allow the prosecution to conduct and adduce DNA evidence in their case was discriminatory and unfair in light of later allowing the appellant to adduce further evidence from Registrar of Births and Deaths. That may have resulted in miscarriage of justice.
 8. This court under the provisions of Section 358(1) of the C.P.C finds it necessary for the afore-stated reasons to have additional evidence taken with respect to DNA analysis of the child, the mother and the appellant to establish paternity. This court notes that the trial magistrate Hon. S.N. Makila went on transfer late last year. It would be rather complicated for another magistrate to take additional evidence in view of the same. This court under Section 358(1) will take the said additional evidence and invite both the appellant and the prosecution to make submissions before the court proceeds to determine the appeal.

In that regard this court will give a mention date upon delivery of this judgment for purposes of fixing a hearing date for the additional evidence.

JUDGEMENT, DATED, SIGNED AND DELIVERED, AT KITALE THIS 3RD DAY OF APRIL, 2025.

HON. JUSTICE R.K.LIMO

KITALE HIGH COURT

Judgment delivered in open court

In presence of:-



Mr Mugun for the State

Chemosop/Duke- Court Assistants

M/s Chebii holding brief for Chebii for Appellant

Jimmy Rotich Barngetuny the Appellant

