



REPUBLIC OF KENYA



**KENYA LAW**  
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**CMK v Republic (Criminal Appeal E120 of 2023)  
[2025] KEHC 5584 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5584 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E120 OF 2023**

**DR KAVEDZA, J**

**MAY 6, 2025**

**BETWEEN**

**CMK ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered on  
27th April 2023 by Hon. E. Boke (SPM) at Kibera Chief Magistrate's Court  
Sexual Offences Case No. 72 of 2020 Republic vs Charles Moses Karanja)*

**JUDGMENT**

1. The appellant was charged and after full trial convicted by the Subordinate Court of the offence of defilement contrary to section 8(1) as read with 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on diverse dates between 14<sup>th</sup> May 2020 and 17<sup>th</sup> July 2020 at Kabiria in Riruta within Nairobi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of S.W.K a child aged 15 years. He was sentenced to serve fourteen years and four months imprisonment.
2. Aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal, he challenged the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
3. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence which was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.
4. The prosecution availed three (3) witnesses in support of their case. The complainant, PW2, testified that she was born on 29th June 2005, making her 15 years and 7 months old at the time of the incident.



She stated that in May 2020, after a disagreement with her mother, she stayed with her friend F for two weeks. By late June, she moved in with the appellant, M, who had been her boyfriend since March 2020. She admitted to lying to M about being in Form Three and confirmed they engaged in unprotected sex at his house when she moved into his house after a disagreement with her mother. In July 2020, she and M were arrested, and a hospital visit revealed she was pregnant. During cross-examination, she noted they had sex on days M stayed at the house. She also mentioned her mother once came looking for her, but she refused to return home.

5. PW1, the complainant's mother, confirmed her daughter's birth date as 28th June 2005, producing her birth certificate. She was unaware of the appellant until the incident. On 17th April 2020, she returned home to find her daughter missing. Two days later, she learned her daughter was seen with the appellant. When she visited M's house, neighbours confirmed seeing an unfamiliar girl. PW1 pleaded with M to allow her daughter to complete Form Four, but he refused. Two weeks later, her daughter briefly returned home after a possible altercation but went back to M. PW1, with her brother, later found her daughter at the appellant's grandmother's house in torn clothes. Exhausted, PW1 initially stayed silent. On 17th July 2020, village elders reported the matter to the chief, who arranged a meeting. M refused to release the minor, prompting police involvement. PW1 then took her daughter to the hospital. During cross-examination, she stated she had initially forgiven M but did not consent to the relationship.
6. PW3, the medical practitioner, testified that on 17th July 2020, the minor, S.W.K., visited their facility. It was reported she had run away from home and engaged in sexual intercourse with a known male, multiple times. Examination revealed bruises on her back and forearm, a cut on her right foot, and a urinary tract infection. Her outer genitalia were normal, but the hymen was not intact, showing old perforations and whitish discharge. PW3 produced lab reports, the PRC, and P3 form as exhibits.
7. In his defence, the appellant testified that he was born on 9th May 2002, making him 18 years and 2 months old at the time of his arrest on 17th July 2020. He stated he became friends with the complainant in March 2020, and their relationship developed. When the complainant had disputes with her mother, she would stay at his place temporarily. He acknowledged her pregnancy and noted that their families had discussed the matter. He claimed the complainant repeatedly returned to his place, including his grandmother's house, after conflicts with her mother, even post-arrest, to avoid an abortion. She only returned home when six months pregnant. During cross-examination, he admitted living with the complainant, unaware of her age, and believed it was not wrong to have sex with a 17-year-old.
8. To succeed in a prosecution for defilement, it must be proven that the accused committed an act that caused penetration with a child. "Penetration" under Section 2 of the Act means, "the partial or complete insertion of the genital organs of a person into the genital organs of another person."
9. Further, section 8(1) and (3) of the [Sexual Offences Act](#), No. 3 of 2006 provides thus: -
  8. Defilement
    - (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
    - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
10. On the issue of age, PW1, the complainant's mother, testified that her daughter was born on 28th June 2005, producing a birth certificate as evidence. This was uncontested, and PW2, the complainant,



confirmed her birth date. The incidents occurred in June and July 2020, when she was 15 years old, legally a child.

11. Regarding penetration, PW2 testified clearly that she engaged in unprotected sexual intercourse with the appellant multiple times while staying at his house. Her consistent account was supported by PW3, the medical practitioner, who noted old hymenal perforations during the examination. Under the *Sexual Offences Act*, penetration includes partial or complete genital insertion, and the complainant's testimony established this element.
12. On identification, the complainant identified the appellant, M Karanja, as her boyfriend since March 2020, detailing their cohabitation and sexual encounters. The appellant admitted to the relationship, cohabitation, and her pregnancy in his defence. His claim of ignorance about her age does not constitute a defence to defilement.
13. The issue of the appellant's age is also crucial. The appellant claimed he was born on 9th May 2002, making him 17 years at the time of the offence in 2020. The trial court ordered an age assessment report to verify his age but failed to ensure it was availed, wrongly shifting the burden to the appellant, who was in custody and possibly a minor. Without evidence disproving his claim, supported by his father's statement in the social inquiry report, the court should have accepted he was 17 years old. He was therefore a child under the law, deserving care and protection.
14. This case underscores the challenge of sexual activity between minors. While unacceptable due to legal and emotional consequences, jailing one minor while sparing the other lacks fairness. Imprisonment often fails to address root causes like inadequate education. Alternatives like counselling, sex education, or restorative justice better promote accountability and growth, ensuring equitable treatment.
15. Given the trial court's error in handling the age assessment, the appeal succeeds. The trial court's conviction is quashed and the sentence set aside. The appellant CMK is set at liberty unless otherwise lawfully held.

Orders accordingly.

**Judgement dated and delivered virtually this 6<sup>th</sup> day of May 2025**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant Present

Suge for the Appellant

Mutuma for the Respondent

Tonny Court Assistant.

