



REPUBLIC OF KENYA



**Kanini v Republic (Criminal Appeal E025 of 2023)  
[2025] KEHC 7482 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7482 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E025 OF 2023**

**MW MUIGAI, J**

**MAY 19, 2025**

**BETWEEN**

**PATRICK SAFARI KANINI ..... APPELLANT**

**AND**

**REPUBLIC ..... PROSECUTION**

**JUDGMENT**

**Trial Court Proceedings**

1. The accused was charged with the offence of Defilement Contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the charges read:
2. Patrick Safari Kanini on diverse dates between 4/4/2020 and 23<sup>rd</sup> August 2020 at Kalama location Kalama sub location within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of JKN a child aged 15 years.
3. In the alternative the accused was charged with Indecent Assault contrary to Section 11 of the *Sexual offences Act*. The particulars were that on diverse dates between 4<sup>th</sup> April 2020 and 23<sup>rd</sup> August 2020 at the said place in Machakos county the accused touched the vagina of JKN a child aged 15 years .
4. The accused pleaded not guilty.
5. The prosecution called 5 witnesses in proof of the charges, the accused was also placed on his defence.
6. The court convicted and sentenced him to serve 25 years jail term as per judgment and sentence of Hon. Principal Magistrate M.A Otindo delivered on 3/7/2023.

**The Trial.**

7. PW1, the victim gave sworn evidence after the court carried out voire dire examination. She was 16 years at the time of the testimony and said that she was born on 25/5/2005 and was a student of [Particulars



- Withheld] primary school in 2020. That the accused was her husband and that she went to his place of work on 4/4/2020 and began to stay with him. She did not tell her parents. They stayed as boyfriend and girlfriend in April and engaged in sex.
8. That in May they went to greet his parents and the accused said she would go back to school. They stayed for 2 weeks and he refused to release her to go back to school. He told her that she should be his wife which she did not want.  
They stayed as husband and wife and she was there having sex until 23<sup>rd</sup> August 2023.
  9. That on 28/7/2020 she went to hospital to check on pregnancy after missing her periods for 2 months, she was told she was pregnant. HIV test was negative.
  10. That the accused started being cruel and she decided to go back home. She went to the village elder of the Accused's area on 23/8/2021 and said that she wanted to go back home. They went to Kalama sublocation and the accused came with his parents. She was taken to Machakos police station where she slept and was taken to hospital by one of the police officers where she was confirmed to be pregnant.
  11. She referred to the P3 form, the age assessment report, the post rape care form and the CT Scan. She testified that was told to go home and deliver the child and go back to school. She delivered on 2/2/2021 and that the accused was the child's father. He was also arrested. He was identified at the dock.
  12. PW2, JK a resident of KT and she was hunched victim's mother said that she was 16 years and that she knew the accused before the incident.  
That she would see him in the area, they were not talking. The victim is his 7<sup>th</sup> child.
  13. That the victim disappeared on 4/4/2020, PW2 was called by the victim's mother who informed him that the child had gone to take a book to a class mate. On 6/4/2020 he went to report the matter at Kaewa police post
  14. He looked for her from relatives in vain. He received a call on 28/8/2020 from a headman called Anna who introduced herself that she was from Kali area. She asked him if he knew Nzilani, she said that she was with her and that she had been assaulted. He told her to keep her as he did not have means, he also told her to take her to the police station.
  15. He was called by the OCS Machakos police station on 24/8/2020 and told to go to the police post, He went to Kaewa police post. He was told by the caller that they would go pick the child at the police station.
  16. He arrived at 3:00pm and he found the OCS, he was directed to the Children office and was also told that his child was at the hospital. The child was handed to him and was told to avail her when required.
  17. That the child told him she was at Mbooni area with her friend who told her to go accompany him to assist her mother. That the man was called Kanini he stated that his daughter delivered on 4/2/2021. She said the father of the child was Patrick Safari Kanini. He did not know him.
  18. The accused did not have questions for the witness.
  19. PW3 Jacob Mwanja Mutiso was a retired assistant chief of Isyulu sub location. He testified that he knew the complainant and that on 23/8/2020 at 7.00 am the girl/victim she came to his house with a village elder from Njariti village called Anne Wairimu. She told him that the girl came to her and told her she was married to the accused, the child was left with him.



20. He sent the village elder to call Patrick and the mother. Patrick said he knew the girl who was his wife and that she was called JKN aged 15 years. She was schooling and was in class 7. She got married to the Accused Person. That they had a domestic dispute that night. The accused mother also said that she was her daughter in law. PW3 took the girl to the police post where he reported the case as the girl was below 18 years old.
21. They called the girl's father who confirmed that his daughter had been missing and he referred to a report and occurrence book entry OB 04/08/04/2020. That the police officer took the two to Machakos police station. The accused was identified in court by PW3. He did not have questions for cross examination.
22. PW4 Dr Jack Welanga gave testimony on behalf of Dr Mutunga who had examined the Complainant. The court was told that the examining and treating doctor was unwell for 6 months. PW4 had worked with him for 10 years .The accused did not object to Dr Welanga 's testimony.
23. He testified that high vaginal swab showed pus. That the complainant was pregnant, she did not have physical injuries and she was given antibiotics. The age of the victim was 15 years.
24. That genitalia was normal for her age but the hymen was broken-old. Tests were done and pregnancy was positive. It all indicated sexual intercourse. That DNA could be done after delivery. He also referred to the age assessment which was produced as exhibit 3, the P3 Form as exhibit 4 and a Post Rape Care Form which was also filled produced in evidence.
25. The accused cross examined the doctor. He said that he could not tell if the appellant was responsible for the pregnancy and that Dr Mutunga filled the P3 Form. The victim was attended at Level 5 Hospital.
26. PW5 No 227065 Cpl Noreen Makau investigated the case which was a protection and care case .That the complainant went to the village elder and said she had been assaulted by the accused. The village elder took her to Chief Jacob and she explained how the accused assaulted her on 28/8/2022 .She was taken to Corporal Kariuki and Pc. Nalisi . She was arrested and escorted to Machakos police station while the accused was remanded for defilement.
27. PW5 took the girl to Machakos level 5 where examination confirmed she had been defiled while staying with the accused between 4<sup>th</sup> April-23<sup>rd</sup> May 2023. The victim was pregnant she was 15 years old in class 7 at the time .She told her that the accused was working in Masinga where they met and he took her to his home in Kalama sub county where they stayed until the arrest. She referred to the age assessment report and said the child was 15 years old and that DNA was not done since the child had not been born. The Accused was identified in court. The accused did not cross examine the witness.

The Trial Court delivered Ruling on Case to Answer under Section 211 CPC.

28. The accused was placed on his defence as per ruling delivered on 17/4/2023.

### **The Accused Defence .**

29. His sworn evidence was that he was from Machakos County Kalama sub county and that the village elder visited him on 24/8/2020 and was told that the sub chief wanted to see him . He found police at the sub chief office and he was arrested and taken to the chief .He was told that he had defiled Nzilani who was a school student.
30. He testified that he had married her and that they met in May and they visited her parents who gave him blessings to marry her .He took her to his home in May 2020.



31. That she was pregnant and he told her to go for paternity test .She came back and told him the pregnancy was not his. That he would still take care of the child being the only son he wanted a family, he also decided to stay with her.
32. The accused stated that no one advised him that complainant was in school and there was no birth certificate to show she was a child.
33. He said cross examination that she told him she was 24 years .She found her working and she refused to give him her ID .The family also said she was 24 years old. Her parents gave him permission to marry her . Further that she came when she was pregnant and that he sent her to do a paternity test. He admitted having sex with her. In cross examination he said he married her. He did not defile her she lied to him and refused to give him her ID card.

### **The Court's Judgment**

34. The court found that the accused and the complainant knew each other and that they were living together when he was arrested.
35. That age was proved by the age assessment report which showed that she was 15 years old. That the defence claim that she was 24 years was not convincing and did not displace the prosecution's case .The victim was a child and she testified that they had sexual intercourse with the accused .The accused also admitted this, therefore penetration was not disputed.
36. The court addressed the defense and found that the accused did not state what he did to establish that the victim was a minor like obtaining her identity card .He failed to do proper diligence and he assumed too much or believed too much.
37. He was convicted for the main offence under Section 215 of the [Criminal Procedure Code](#).
38. The appellant was heard on his mitigation, he said that he was a first offender and that he was 20 years and the sole breadwinner .He prayed for consideration of the period of custody.
39. The court sentenced him to 25 years jail term .The court held that the offence was quite rampant in the area and that the objective of the sentence was to deter the society. The sentence run from 25/8/2020.

### **The Appeal**

40. Aggrieved , the appellant filed his petition of appeal on 19/7/2023 and submissions dated highlighting the following grounds of appeal .That
  1. The learned Magistrate erred in failing to note that the appellant's right to fair trial was compromised due to lack of legal representation.
  2. The Magistrate erred in failing to establish the age of the complainant beyond reasonable doubt
  3. The Magistrate erred in failing to make a finding on age and consensual sexual relations.
  4. The Magistrate erred in assessing the prosecution's case and credibility of the witnesses.
  5. The Magistrate erred in failing to consider the appellant's plausible defence thereby occasioning miscarriage of justice.
  6. The Magistrate erred in failing to consider his personal circumstances and mitigation.
  7. The Magistrate erred in law by meting out a sentence that was disproportionate excessive and manifestly harsh.



8. The Magistrate erred in law in failing to consider the impact of the sentence on his rehabilitation “vis a vis” the impact of the sentence on his family

### **Written Submission .**

#### **The accused submission**

41. The accused case is that his right to fair trial was violated due to inadequate legal representation which had a prejudicial impact on his case.
42. The conviction was unsafe .That poor preparation inadequate legal representation and failure to object to legal issues meant that his trial was conducted in an environment which he was unable to defend himself. The appellant refers to the case of Hussein -Vs- Republic [2007] EA 80 failure to provide legal representation amount to denial of fair trial.
43. The accused submits that the complainant stated she was 16 years but in other parts of the case was said to be 15 years ,that formal documents such as birth certificate was not produced .The age assessment was done by the investigating officer but there was no formal verification from an official source .That her father testified on age but he did not produce supporting evidence to confirm age .
44. The accused case that she said she was 24 years casts doubt on the case, the prosecution case has significant flaw.
45. The complainant’s age was contested and was not conclusively proved through reliable evidence.
46. That there was no evidence beyond the complainant’s word to establish that he knew or ought to have known she was under the age of consent. That the doubt on age cannot lead to a conviction unless the prosecution proves it beyond reasonable doubt as per the case of Moses Kamau Njoroge Vs Republic (2020) eKLR and Stephen Mwangi –Vs- Republic (2016) eKLR
47. Further the person charged must be shown to have had actual knowledge of the complainant’s age or acted recklessly in engaging in sexual relations with someone who was under age Karanga Vs Republic 1983 KLR 50.
48. The appellant further submits that the court failed to analyse the credibility of the complainant evidence .That she said she was 16 years which contradicted the age assessment proving she was 15 years , her circumstances surrounding her relationship with the accused was also inconsistent .The court instead dismissed his defence as an afterthought .That he had given explanation for his actions and the complainant appeared to be an adult and even told him she was 24 years were important factors that the court failed to adequately consider .
49. That he was led to believe he was of legal age and had been given blessings to marry her
50. The appellant refers to the case of Wanjohi –Vs- Republic (2014) eKLR and the case of Njiru – Vs- Republic( 2013) eKLR in both cases the court of appeal held that the defence should not be summarily dismissed without giving it due consideration .That there was need for corroboration of the complainant’s evidence
51. On sentencing, the appellant submits that he was a first offender and was aged 20 years. He deserved leniency and had pleaded for a non-custodial sentence. The appellant refers to the case of Yusuf .O. Hassan –Vs- R 2019 eKLR where the court of appeal held that youth offenders could benefit from leniency provided that there is no aggravating circumstances ,



52. He was young and there was a likelihood that he was unaware of the consequences of his actions. Reliance is placed on *Musa Mwaura –Vs- Republic (2013)* eklr the court held that youthful offenders should not be automatically treated as adults and the personal circumstances should be considered.
53. The appellant refers court to the case of *Moses Kivui Kinyua –Vs- Republic (2016)* eklr where the court held that responsibility to young children or dependents could mitigate the sentence.
54. That 25 years imprisonment was disproportionate to the mitigating factors and also considering that there was lack of strong physical evidence and the inconsistency in the complainant's testimony.
55. Lastly, that the court failed to consider the appellant's potential rehabilitation and the impact of the sentence on the family and future prospects of reintegrating with the society .That a shorter sentence would better support his rehabilitation prospects *Daniel Ndungu Vs Republic 2016* eklr , the court should balance between punishing the offender and affording them an opportunity for rehabilitation .*Terry Mungai Vs R 2015* eklr .

### **The Prosecution's Submissions**

56. The prosecution's case is that age was proved by the age assessment produced as Exhibit 3. That the complainant was 15 years old and pw1's testimony that she was born on 15/5/2005 .
57.
  - (a) Positive Identification of the accused; The State relying on the case of *Peter Musau Mwanzia v Republic (2008) EKLR*, where the Court of Appeal stated that
 

“The state must prove that the subject was able to identify the accused on the account that he was not a stranger to her”.
  - (b) Penetration: the state submits that the element of penetration as defined under section 2 of the SOA was duly proved as follows; PW1 the complainant stated that when she lived with the Appellant as his wife they had sex. Refer to page 19 para 7 and 11-12.
 

PW4 Dr. Jack Walenga confirmed that when Pwi was examined there was evidence of sexual intercourse and produced the p3 form and PRC form. Refer to page 45 para 12.
  - c) Age: In the case of *Kaingu Elias Kasomo-Vs- R Malindi*  
CR. APP. NO. 504 OF 2010.  
Prof. Ngugi J. in *Machakos Hc. Cr. Appeal No. 296 of 2010 Fappyton Mutuku Ngui -Vs- Republic*:  
PW1, testified in court on 17<sup>th</sup> January, 2022 and stated she was born on 25<sup>th</sup> May, 2005, putting her age at about 15 years when the offence was committed. PW4 produced the age assessment as Exb3 that assessed PW1's age as 15 years.
58. The Court of Appeal in *Wambui C Republic (criminal Appeal 102 OF 2016) [2019] KECA 906 (KLR) (22 March 2019) (Judgment)*  
With regard to the provisions of section 8(5)(a)(b) and 8(6)  
"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"



## **Analysis & Determination.**

59. The duty of the first appellate court was highlighted in the case of *Okeno v R* [1972] EA 32 [1972] EA 32.
60. Following the settled principle, court has considered the charge and its particulars together with the evidence adduced during the trial. The court is required to draw independent conclusions and determine whether the judgment was based on evidence. The court is however reminded that it never saw or heard witnesses and due allowance shall be made for this exception,
61. The grounds of appeal and submissions filed in the case have been considered.
62. The fact that the complainant had sexual intercourse with the accused was proved in the oral testimony given by PW1 and medical evidence produced by PW4. The accused also admitted living with the complainant and that they had sex. She was also pregnant although he claimed he was not responsible for the pregnancy.
63. That said, I find the following issues are for determination:
  1. Whether the accused right to fair trial and legal representation was violated and whether the trial was prejudicial
  2. Whether age was proved beyond reasonable doubt
  3. Whether the accused defence was credible and whether it shook the prosecution's case
  4. Whether sentence was lawful and reasonable in the case.

### **Whether the accused right to fair trial and legal representation was violated and whether the trial was prejudicial**

64. Article 50(2) (g) provides that : Every accused person has the right to a fair trial, which includes the right-
  - (g) to choose, and be represented by an advocate, and to be informed of this right promptly.
65. The appellant was not represented during the trial. State sponsored representation is determined by the trial court which has discretion under Section 36(3) of the *Legal Aid Act*, of the *legal Aid Act* to determine appropriate cases for such representation and where the appellant is likely to suffer prejudice or face serious charges and sentences.

Further the court has a further duty to advise him of the right to choose an advocate of his choice during plea taking or at early stages of trial. In the case of *Joseph Kiema Philip vs. Republic* (2019) eKLR added his voice on the subject in the following manner: -

.....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that the he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.....

66. The accused case is that he was not given adequate representation and that this affected his case. That he did not cross examine the witnesses and that he was unable to defend himself.



67. However, case law takes position that such applications should be raised at the trial court where action can be taken to prevent prejudice. Also that the court considers whether the accused suffered and /or was likely to substantial injustice during trial.
68. In the case of William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) *v Republic (Criminal Appeal 49 of 2020)* [2022] KECA 23 (KLR), the Court of Appeal dismissed lack of representation noting that the issue of legal representation and violation of Article 50 of *the Constitution* was not raised at the Trial Court but at the High Court .The accused also cross examined witnesses , participated in the trial and no prejudice was suffered as confirmed from the Trial Court Record.
69. The court noted the importance of being informed of the right to legal representation and stated that “ operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial.“
70. Further that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the constitution* demands it.
71. In the case of Abdi v Republic (Constitutional Petition E02 of 2023) Nyakundi J held at paragraph 33 that “... a trial can be fair even though there has been a threat or infringement of the constitutional rights. In other words, the breach of the constitutional duty alone vested in the state cannot result in a miscarriage of justice or prejudice. What the petitioner was required to demonstrate by evidence was how such a breach of a constitutional duty had caused a miscarriage of justice to him.”
72. In this case, the appellant was not advised of his right to seek legal representation or assess whether he was entitled to state sponsored legal representation.
73. That notwithstanding , I find that he was able to answer the charges and its particulars .The trial was also conducted in a language he understood so that he was able to cross examine the doctor and he also prayed for bond review .He also able to put up his defence and he was cross examined on his case .
74. The record is also instructive that he was given an opportunity to cross examine all witnesses but he did not have questions for the witnesses.

This Court concludes that the Trial was not a violation of Article 50 of Constitution and that the conviction was safe. Legal representation is not mandatory requirement in every case but on application by the accused person during trial and on advise caution by the Trial court.

#### **Whether age was proved beyond reasonable doubt .**

75. The prosecution must prove that the appellant had sexual intercourse with a person below 18 years.
76. Age must be proved beyond reasonable doubt and with credible evidence.
77. The complainant was taken through voire dire , she gave sworn evidence and knew the import of oath and telling the truth in court . She testified that she was born on 25/5/2005 and was 16 years when she testified on 17/1/2020 .She also said she was attending school at Mukuru primary and was in class 7 when she went to stay with the appellant.
78. Her father testified that when she went missing, her mother said she had gone to get a book from a classmate.



79. Pw1 identified the age assessment report dated 24/3/2020 which was produced as Pex3 by the doctor.
80. The report was signed by Dr Kamolo from Machakos level 5 Hospital and reads as follows:- “ I have examined Jacinta Nzilani and assessed her/his age at about 15 years old ..”
81. In Thomas Mwambu Wenyi –Vs- Republic (2017) eKLR the Court of Appeal cited with approval Francis Omuromi Vs. Uganda, Court of Appeal Criminal Appeal No.2 of 2000 which held that:-“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may be proved by birth certificate, the victim’s parents or guardian and by observation and common sense....”
82. In the case of E K –Vs- Republic [2018] eKLR Githinji J addressed age assessment which was produced in court without evidence of the doctor and how assessment was done .The court held that these doubts had to be assessed in favour of the accused .That :-
83. “In this particular case the age given of the complainant by those who would know it was contradictory. Age assessment did not disclose how it was carried out and ascertained that she was 16 years old. The one who did it is not even the one who was called as a witness. Given the foregoing circumstances, the fact is that the age of the complainant was not ascertained. She could have been an adult or a child. She consented to having a sexual relationship with the appellant, whom she called her boyfriend. If she was an adult, she had capacity to consent and the appellant committed no offence.”
84. In this case , pw1 was able to state her date of birth .Her evidence also demonstrated that he was school going and that they had agreed with the accused she would go back to school .Thus her statement during voire dire ..” I have not gone back to school. “

**Whether the defence was credible and whether it shook the prosecution’s case .**

85. The accused testimony was that he was arrested at the chief’s office after being told that he had sex with a girl who was a schooling student .He said that the complainant and his family said she was 24 years old and that her parents gave him blessings to marry her .Also that she had sex with her and he did not know her age .
86. The appellant did not cross examine pw1 and pw2 on these issues.
87. The complainant also testified that they stayed together from April and May and that she was to return to school .The accused refused to let her go back to school and said she should be his wife .
88. Pw3 also knew the complainant .She was brought by the village elder on claim that she had been assaulted by the appellant .PW3 called Patrick , the appellant herein who came and confirmed knowing her as Jacinta Nzilani aged 15 years was school going and was in class 7.
89. The appellant’s mother was also present and said that the complainant was her daughter in law. The appellant did not challenge this evidence.
90. I find that the case was proved beyond reasonable doubt that indeed the appellant had sexual intercourse with knowledge that the victim was aged 15 years was school going.
91. His defence was also contradicted and in such circumstances did not cast doubt in the prosecution’s case. He claimed that no one told him the complainant was a child, Pw3 proved that he knew her age and she was also attending school .Pw1 also proved that they had agreed that she would go back to school.



92. The fact that the complainant refused to give him her Identity card was not supported, the accused did not explain to court what made him believe she was an adult as required under Section 8(5) if the *Sexual Offences Act*.
93. Further, he also claimed that the complainant came when she was pregnant .He stated in examination in chief that she fell pregnant during the time they were together when he told her to take a paternity test.

**Whether the sentence was lawful and reasonable in the case .**

94. Section 8(3) of the *Sexual offences Act* provides that :-

“(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.”

95. The accused stated in mitigation that he was a first offender and that he was the breadwinner .He submits that these are mitigating factors which ought to be considered.
96. He submits that minimum /mandatory sentences did not prevent court from considering mitigating factors and that he was aged 20 years old at the time and he deserved leniency.
97. However, the court had discretion to mete out 25 years jail term which was a period above the statutory minimum sentence .The discretion can be impugned where it was unreasonable and failed to balance the mitigating circumstances such as rehabilitation with the aggravating factors and the desired objective of deterring offenders in the area.
98. In the case of *Dalmas Omboko Ongaro –Vs- Republic* [2016] eKLR the court stated that:
- ...The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.” (Emphasis mine).
99. In the South African case of *R –Vs- Keke No. 404 of 2010* cited by Nyakundi J in *Raima Ragah Hassan –Vs- Republic* [2020] eKLR , the South African court of appeal held that :
- “In relation to young offenders and first offenders, it is wrong to use them for general deterrence, which is using them as a means to deter others. Such sentences are wrong in principle. They compare using life as a means to an end.”

**Disposition**

100. The Conviction is upheld and appeal dismissed except with regard to sentence he is 1<sup>st</sup> offender and serve 20 years jail term as provided in statute which will run from the date of arrest on 23/8/2020.

**JUDGMENT DELIVERED SIGNED DATED IN OPEN COURT IN MACHAKOS HIGH COURT VIRTUALLY/PHYSICALLY ON 19/5/2025.**

**M.W.MUIGAI**  
**JUDGE**

