



REPUBLIC OF KENYA



**Muthama v Republic (Criminal Appeal E017 of 2024)
[2025] KEHC 5547 (KLR) (Crim) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 5547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL E017 OF 2024**

KW KIARIE, J

MAY 5, 2025

BETWEEN

GEOFFREY MAINA MUTHAMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. Case No. E035 of 2021 of the Senior Principal Magistrate's Court at Engineer by Hon. E. Wanjala–Principal Magistrate)

JUDGMENT

1. Geoffrey Maina Muthama, the appellant herein, was convicted of the offence of defilement of a girl contrary to section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of the offence were that in mid-October 2020, within Nyandarua South sub County of Nyandarua County, intentionally caused his penis to penetrate the vagina of VWK, a child aged sixteen years.
3. The appellant was sentenced to fifteen years' imprisonment. He has appealed against the conviction. He was in person and raised the following grounds of appeal:
 - a. The learned trial magistrate erred in finding that the prosecution had proved its case beyond a reasonable doubt.
 - b. The trial court erred in law by failing to recognize that the appellant reasonably believed the complainant had granted her consent.
 - c. The complainant did not report immediately on her own volition.
 - d. The learned trial magistrate erred in law and fact in failing to consider the appellant's defence.



4. The state did not file grounds for opposing the appeal or provide their submissions.
5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of *Okeno vs Republic* [1972] E. A 32 to guide my decision-making process.
6. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:
An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:
 - a. That there was penetration of the complainant's genitalia;
 - b. That the accused was the perpetrator, and
 - c. The victim must be below eighteen years old.

This position was echoed in the case of *Fappyton Mutuku Ngui vs Republic* [2012] eKLR when Joel Ngugi J. said:

"Going by this definition of defilement, I agree with Mr. Mwenda on the issues the court needs to determine. The first is whether there was penetration of the complainant's genitalia; the second is whether the complainant is a child; and finally, whether the penetration was by the Appellant."

These are the ingredients that the prosecution must prove against an accused person.

7. The copy of the birth certificate presented as an exhibit indicates that VWK was born on the 4th day of May 2004. As of October 2020, she was 16 years and five months old. Contrary to the appellant's contention, the complainant's age was proved.
8. The appellant contended that the sexual intercourse between him and the complainant was consensual. He further stated that he believed the complainant was an adult.
9. According to the evidence from CPL, Dickson Koibir (PW3), the complainant's mother, reported this case on March 8, 2021. TW (PW2) stated that when her daughter was sent home due to non-payment of school fees, she noticed that she was pregnant. She asked whether this was true, but the complainant did not respond. When she reported the case to the police, the complainant informed her that Maina wa Muthima was responsible for the pregnancy.
10. This is what VWK told the trial court:

"I met with a certain guy called Maina. He stopped me, he greeted me, he told me his name, he took me to the farm, he forced me to the farm, he took my hand and took me to the shamba. I did not resist; he was stronger than I, he did not tell me where he was taking me, and we went to the shamba, less than a kilometre from the farm. It was a maize plantation.

I do not know whose farm it was. In the maize plantation, he removed my clothes. I had trousers and my pants. On the supper [sic] part, he did not remove anything. While he was undressing me, I was seated on the ground. He also undressed himself, he removed his trousers and boxers, and he said I had to have sex with him. I did not have any option. He defiled my vagina. He used his organ used to urinate "penis" after he defiled me after a month, I realized I was pregnant that is when I told my mother."



11. This is what she said during cross-examination:

"I know you. I know you are my neighbour, and you come from our village. I was not your girlfriend. We just met on the date of the suit incident; you defiled me. When we met, the path did not have people. After the incident, we reported to the police station a month later. I am sure you defiled me.

I saw you defile me. During the period of the suit incident, I was at school at the time I was at school. I was on the midterm. On the date of the suit incident, I was never employed in a hotel. Maybe you are referring to recent happenings. I have never shown you to my dad. I never met you in a hotel. I never told you that I have an identity card and that I have another child. It was the first day I saw you, and the path did not have people at the time. I could not tell anyone that you were pulling me to the farm. You threatened me not to tell anyone about the defilement, otherwise I would have dire consequences. You stopped me. It was less than 2 hours. When we met and you pulled me to the farm. I had not known you before. After the incident, I have seen you again. When you defiled me, you went into hiding in an unknown place, which is why it took time for your arrest. After the incident, I reported it immediately. I do not know how long it took for your arrest. Yes, I saw you defile me. It is you who defiled me. I have never shown you, my dad. But my dad knows you, how I do not know. Yes, the person who defiled me is you before the court."

12. From this narration, it is evident that the sexual intercourse was consensual. Contrary to the complainant's testimony in court, the appellant was not a stranger to her; she provided his full name to her mother. During cross-examination, she stated he was their neighbour. The learned trial magistrate erred in believing the complainant when she testified that she was forcefully defiled and that she was not in a relationship with the appellant. Their sexual relationship came to be known due to her pregnancy. This is when it was reported.

13. The learned trial magistrate ought to have found that the complainant stated that the appellant supported her by providing for rent and food.

14. The only question is whether the appellant was made to believe she was an adult. Section 8 (5) and (6) of the *Sexual Offences Act* provides:

(5) 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 they were 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.

(6) 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.

15. The Court of Appeal in *Wambui v Republic (Criminal Appeal 102 of 2016)* [2019] KECA 906 (KLR) observed as follows:

12. A reading of section 8(6) of the *Sexual Offences Act* seemed to add a qualification to subsection (5)(b) that separated it from the belief proceeding from deception in subsection (5)(a). Therefore, the elements constituting the defence should be read disjunctively if the two subsections were to make sense. Further, it stood to reason that a person was more likely to be deceived into believing that a child was over the age of 18 years if the said child was in the age



bracket of 16 to 18 years old, and that the closer to 18 years the child was, the more likely the deception, and the more likely the belief that he or she was over the age of 18 years.

13. The burden of proving that deception or belief fell upon the appellant, but the burden was on a balance of probabilities to be assessed based on the appellant's subjective view of the facts. Thus, whereas indeed the complainant was still in school in Form 4, that alone would not rule out a reasonable belief that she would be over 18 years old. It was also germane to point out that a child need not deceive by way of actively telling a lie that she was over the age of 18 years. Had the two lower courts properly directed their minds to the appellant's defence and the totality of the circumstances of the case, they would in all likelihood have arrived at a different conclusion on it. It was a non-direction that they did not do so, rendering the conviction unsafe. [Emphasis added]
16. The defence that the appellant assumed the complainant was an adult came early during cross-examination. The learned trial magistrate had a duty to observe and record if the stature of the complainant would mislead any reasonable person into believing she was an adult. She did not make any note of her observation. When an accused raises a defence, the prosecution must prove that the defence is not true. In this case, all that was required was for the prosecution to invite the court to take note of her stature. This was not done, and the learned trial magistrate did not comment. This was a reasonable doubt.
17. After analysing the evidence on record, I find that the defence raised by the appellant was not displaced. The conviction is not safe. It is, therefore, quashed, and the sentence is set aside. The appellant is at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT NYANDARUA THIS 5TH DAY OF MAY 2025

KIARIE WAWERU KIARIE

JUDGE

