



REPUBLIC OF KENYA



**KENYA LAW**  
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**George v Republic (Criminal Appeal E018 of 2024)  
[2025] KEHC 10269 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10269 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CRIMINAL APPEAL E018 OF 2024**

**M THANDE, J  
JULY 11, 2025**

**BETWEEN**

**TONNY RASHID GEORGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein, was convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act* in *Kaloleni Sexual Offences Case No. E022 of 2022* and sentenced to 15 years imprisonment. The particulars of the offence are that on diverse dates between April 2022 and 2.7.22 at [Particulars Withheld] village, Kaloleni location, Kaloleni sub-county within Kilifi county, intentionally and unlawfully caused his penis to penetrate the vagina of EK, a child aged 17 years.
2. Being aggrieved by the decision of the trial Magistrate, the Appellant has appealed to this Court against both the conviction and sentence. The summarized grounds of appeal are that the trial Magistrate erred in:
  - i. failing to consider that the prosecution did not discharge its burden of proof to the required standard.
  - ii. Failing to consider that the mandatory minimum sentence contradicts Section 329 of the *Criminal Procedure Code*.
  - iii. Failing to consider his defence.

The Appellant urged that the Appeal be allowed, the conviction quashed and the sentence set aside.



3. As a first appellate Court, I have subjected the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32.
4. Although the Court was told that the Respondent filed written submissions, the same was not availed to the Court up to the time of writing this judgment.
5. To sustain a conviction for the offense of defilement, 3 ingredients must be established by the prosecution. This was set out in *Charles Wamukoya Karani v Republic*, Criminal Appeal No. 72 of 2013 where the Court stated:

The critical ingredients forming the offence of defilement are; age of the complainant, proof of penetration and positive identification of the assailant.

6. This Court is required to determine whether in the court below, it was demonstrated that the Complainant was below 18 years of age. Secondly, that there was penetration of the Complainant's genitalia. Lastly, that the evidence identified the Appellant as the perpetrator.
7. The record contains the birth certificate of the Complainant which indicates that she was born on 16.7.05. Between April and July 2022 when the offence is alleged to have been committed, the Complainant was 17 years old.
8. As regards penetration, the Complainant stated that she told the Assistant Chief that she was in a relationship with the Appellant. She further told the trial court that in April 2022, while selling vegetables at home, the Appellant gave her Kshs. 10/= to buy a sweet which she did. One evening in April 2022, the Appellant took her to a kiosk. He started to kiss her, removed her clothes, put her on the ground and penetrated her vagina with his penis. He warned her not to tell anyone. A week later, there was a wedding and the Appellant offered to buy clothes for the Complainant as her mother did not have the money to do so. She stated that the Appellant took her to the kiosk again and they had sex. The Complainant stated that the Appellant told her that he loved her and that he also told her mother the same and that he wanted to marry her. Her mother told him that the Complainant was a minor and not ready for marriage. In cross examination, the Complainant stated that there was a marriage arrangement between her and the Appellant but that her mother refused to approve of it. She denied that she ever told the Appellant that she was over 18 years old and that she told him she was 17 years old.
9. PW1 Chigulu Mwangolo, a Senior Clinical Officer at Mariakani Sub County Hospital produced the PRC and P3 forms, lab request and report form and treatment notes in respect of the Complainant. He stated that on examination, the Complainant was found to be in good state, her head, thorax, limbs and external genitalia were normal. Her hymen was however broken. PW1 stated that the P3 form confirmed that there was penetration. Penetration was thus established.
10. I now turn to the issue of identification of the perpetrator. The Complainant testified that she and the Appellant had sexual intercourse on at least 2 occasions.
11. PW3 KB, the Complainant's mother stated that in July 2022, the village elder told her that her daughter the Complainant was pregnant and that she wanted to procure an abortion. She then stated that the Appellant who used to buy vegetables from her, had told her that he wanted to marry the Complainant. She however told him that the Complainant was underage and still in school. One evening, the Appellant went to her home and asked her to tell the Complainant to meet him but she refused. At 9pm she realized the Complainant was not at home. She found her at the Appellant's house watching TV and brought her home. PW3 reported the matter to the village elder who called the chief. Later the police arrested the Complainant who told the police that she had had sexual intercourse with



the Appellant 3 times. PW3 further stated that the Appellant's wife told her that people had told her that the Complainant was having sexual intercourse with her husband and that she was pregnant. She then stated that upon examination, the doctor confirmed that the Complainant was not pregnant. In cross examination, PW3 stated that she did not witness what happened between the Complainant and the Appellant. She stated that when she found the Complainant at the Appellant's house, she was watching TV. She further stated that the Complainant had never slept outside their home before.

12. On his part, the Appellant conceded that the Complainant was his friend but denied having sexual intercourse with her. He stated that the Complainant had told him that she was 18 years old and that they had agreed to get married. He however ended the relationship when he heard that the Complainant was expectant.
13. In her judgment, the trial Magistrate found that the prosecution case was consistent that the Appellant had on several occasions defiled the Complainant. Further that the Complainant's testimony that she had never had sexual intercourse with any other person other than the Appellant was corroborated by her mother PW3 and the investigating officer. With respect, PW3 stated that she did not witness the Appellant defiling the Complainant. Her testimony cannot therefore be said to have corroborated that of the Complainant in this regard. Further, she stated that the village elder and the Appellant's wife had told her that the Complainant was pregnant an allegation that was proved to be untrue by the medical evidence.
14. From the record, the only evidence that the Appellant was the perpetrator of the offence was that of the Complainant. The proviso to Section 124 of the *Evidence Act* allows the court to receive evidence of an alleged victim of a sexual offence, notwithstanding that it is the only available evidence and to record the reasons for believing the evidence. Section 124 provides as follows:

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth. (emphasis)

15. For a court to convict an accused person of a sexual offence only on the basis of the uncorroborated evidence of the victim, such court must be satisfied that the victim is telling the truth and must record the reasons for so believing. In the present case, the trial Magistrate misdirected herself in finding that the testimony of the Complainant was corroborated when clearly it was not. Further, trial Magistrate did not comply with the provisions of Section 124 of the *Evidence Act*.
16. In his defence, the Appellant stated that the Complainant had told him that she was 18 years old and that they had agreed to get married.
17. Section 8(5) of the *SOA* 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 he or she was 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.
18. For this defence to be available to an accused person, it must be raised at trial to enable the prosecution response and the trial court pronounce itself on the same. Such accused person must demonstrate that at the time of the alleged commission of the offence, he was deceived into believing that the child was over 18 years old. The trial court then determines the matter taking into account all circumstances including any steps the accused person took to ascertain the age of the complainant.
19. I have looked at the evidence on record. Although both the Complainant and her mother PW3 testified that her mother declined the proposal by the Appellant to marry the Complainant, PW3 nevertheless stated that the Appellant had given her a phone through which he would tell her to ask the complainant to meet him. He also gave her flour. The Complainant also stated that the Appellant had bought them clothes for a wedding when their mother was financially unable to do so. All these factors taken together would lead to the conclusion that the relationship between the Appellant and PW3 was more than that of a neighbor who bought vegetables from her.
20. In the judgment, the trial magistrate did not interrogate these facts and only stated that the Appellant was placed at the scene by the prosecution witnesses and failed to exonerate himself.
21. The Court of Appeal considered the defence under Section 8(5) of the *SOA*, in the case of *Wambui v Republic* (Criminal Appeal 102 of 2016) [2019] KECA 906 (KLR) (22 March 2019) (Judgment), and had this to say:
  34. Subsection (5) states that it is a defense to a charge of defilement if the child deceived the accused person into believing that she was over the age of 18 years and the accused reasonably believed that she was over 18 years. We think it a rather curious provision in so far as it is set in conjunctive as opposed to disjunctive terms which would seem to be more logical as opposed to the current rendition. We would think that once a person has actually been deceived into believing a certain state of things, it adds little to require that his such belief be reasonably held. Indeed, a reading of subsection (6) seems to add a qualification to subsection (5)(b) that separates it from the belief proceeding from deception in subsection (5)(a). We would therefore opine that the elements constituting the defence should be read disjunctively if the two subsections are to make sense.
  35. We think also that it stands to reason that a person is more likely to be deceived into believing that a child is over the age of 18 years if the said child is in the age bracket of 16 to 18 years old, and that the closer to 18 years the child is, the more likely the deception, and the more likely the belief that he or she is over the age of 18 years.
  36. We find merit in the appellant's contention that in all the circumstances of the case he reasonably believed that the complainant was over the age of 18 years. The burden of proving that deception or belief fell upon the appellant, but the burden is on a balance of probabilities and is to be assessed on the basis of 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 is also germane to point out that a child need not deceive by way of actively telling a lie that she is over the age of 18 years. We would give the term deceive the ordinary dictionary meaning which is to;

“Deliberately cause (someone) to believe something that is not true or (of a thing) given a mistaken impression to.”

(Per the Concise Oxford English Dictionary, 12th Edn 2011).

37. So understood, we would think that had the two courts below properly directed their minds to the appellant’s defense and the totality of the circumstances of this 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.
22. In the present case, the Complainant was 17 years old at the time of the alleged commission of the offence. As stated by the Court of Appeal, it stands to reason that a person is more likely to be deceived into believing that a 17 year old child is over the age of 18 years. In her testimony, the Complainant stated that she went to the kiosk with the Appellant and had sex with him. Additionally, PW3 stated that she declined the Appellants proposal to marry the Complainant as she was 17 years old. If indeed this were the case, why did she accept gifts from the Appellant who had clearly expressed his intentions regarding her daughter?
23. Section 8(6) requires the trial court when considering a defence under Section 8(5), to have regard to all circumstances. The steps taken to ascertain the age of a child is only one of them. Given the Complainant’s age of 17 years, her conduct of having sex with the Appellant at the kiosk and PW3’s conduct of accepting gifts from the Appellant, the more likely the deception, and the more likely the belief that the Complainant was 18 years old. I therefore find that the trial Magistrate erred by not considering the Appellant’s defence.
24. Section 111(1) of the *Evidence Act* provides:
- When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
- Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
- Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a reasonable doubt as to the guilt of the accused person in respect of that offence.
25. The defence by the Appellant raises reasonable doubt as to his guilt given the deception by and the conduct of the Complainant and her mother, PW3. I thus find that had the trial Magistrate properly directed her mind to the Appellant’s defense and the totality of the circumstances of this case, she would have in all likelihood arrived at a different conclusion. By dint of the second proviso to Section 111(1) of the *Evidence Act*, the Appellant was entitled to an acquittal.



26. In the end, I find that the conviction of the Appellant in light of his defence was unsafe. The Appeal succeeds and the same is allowed. I accordingly quash the conviction and set aside the sentence imposed on the Appellant. He is forthwith set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN MALINDI THIS 11<sup>TH</sup> DAY OF JULY 2025**

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**M. THANDE**

**JUDGE**

