



**Kosgei v Republic (Criminal Appeal E017 of 2024)
[2025] KEHC 10626 (KLR) (Crim) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10626 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ISIOLO
CRIMINAL
CRIMINAL APPEAL E017 OF 2024
SC CHIRCHIR, J
JULY 17, 2025**

BETWEEN

GEOFFREY KOSGEI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Geoffrey Kosgei [The appellant] was charged with the defilement contrary to Section 8[1] As Read with Sub Section 84 of the *Sexual Offences Act* No. 3 of 2006. [The Act]
2. The particulars of the offence are that on diverse dates between 20th January 2020 and 15th February 2020 at Bulesa Post in Merti Sub-County of Isiolo County within eastern region severally intentionally and unlawfully caused his penis to penetrate the vagina of GAH, a girl aged 17 years.
3. He faced an alternative charge of having an Indecent Act with a Child Contrary to Section 11[1] of The *Sexual Offences Act* of 2006. He was convicted of the main charge and sentenced to serve 15 years imprisonments. He was aggrieved by the outcome and proffered this appeal.

Petition of Appeal

4. In his amended grounds of appeal the appellant has set out the following grounds:
 1. The trial magistrate erred in law and fact by failing to note that the charges herein fall under section 8[5] of the *Sexual Offences Act* Number 3 of 2006.
 2. That the learned trial magistrate erred in matters of law and facts by failing to note that the complainant was over 18 years at the time of the offence.



3. That the learned magistrate erred in law by failing to consider that the legal provision for maximum/minimum sentences under Section 8[4] of the *Sexual Offences Act* denies the judicial officers their legitimate jurisdiction to exercise of discretion is sentence not to impose an appropriate sentence in an appropriate case based on scope of the evidence adduced and recorded on a case to case basis which is unconstitutional and un fair in breach of Article 27 [1] [2] [4] of *the constitution* of Kenya. Hence the sentence imposed on the appellant is unlawful.
4. That the learned trial magistrate failed to take into consideration the defense of the appellant.
5. The appeal was canvassed by way of written submissions.

Appellant's submissions

5. The appellant submits that the onus was on the prosecution to prove that the victim did not behave in a manner likely to suggest that she was over 18 years of age. That when the circumstances of the case suggest that the complainant was behaving like an adult like in this case, the court ought to go by the complainant's behavior and conclude that she is an adult. The appellant contests what constitutes the offence of defilement and argues that the question of whether the complainant was forcefully defiled or threatened, whether the perpetrator took advantage of victim's age, whether the two people were in a sexual relationship and the complainant's behavior should be factors to consider.
6. He further submits that the age of the complainant was not proved beyond reasonable doubt; that he did question the complainant and she confirmed that she was over 18 years. He further points out that indeed it was the complainant's evidence that the Birth certificate that was produced was incorrect; that whereas the complainant's mother told the court that the complainant was born in the year 2003, it was the complainant's testimony that she was born in 1999 , and the age assessment indicated that she was between 19-21 years.
7. On the sentences it is submitted that it was harsh and excessive. In this regard, the appellant has relied on the high court decision in the case of *Maingi & 5 others vs DPP &Ano*[2022]KEHC 13118[KLR].

Respondent's submissions

8. It is the respondent's submission that all the elements of the offence were proved. On penetration it is submitted that the testimony of the complaint and the Clinical Officer [PW4] Proved that penetration took place. It is further submitted that both the age assessment report and the birth certificate did prove that the complainant was 17 years at the time of the incident. On identification it is submitted that the complainant and appellant confirmed that they were in a love relationship. That the complainant identified the appellant as the husband while the appellant identified her as his girlfriend. The respondent further points out that according to the testimony of PW1, PW2 and PW3 the appellant was arrested while the complainant was in his house.
9. In regard to the provisions of section 85 of the Act it is submitted that the appellant did not state how the complainant deceived him or the steps he took to ascertain the complainant's age.
10. On sentence, it is the respondent's submission that this court has no reason to interfere with it as the trial court took into account all the usual considerations before passing the sentence.

Analysis of the evidence and determination

11. This being a first appeal, this court is mandated to review the evidence, do its own evaluation, and arrive at its own findings. [see:Ref Okero Vs Republic [1972] E. A 32]



12. I have considered the trial court's records; grounds of appeal and party's submissions and I have identified the following issues for determination;
 - a. Whether the offence of defilement was proved.
 - b. Whether the sentence was excessive

Whether the offence of defilement was proved

13. To constitute an offence of defilement, the age of the child must be proved, the identity of the perpetrator and that penetration took place.

Identity of the perpetrator and penetration

14. The identity of the perpetrator was not an issue during trial or in this Appeal. The appellant told the court that the complainant was his girlfriend and to the complainant the appellant was the husband. It was also common ground that the complainant was in the appellant's house when the appellant was arrested. Thus, the two knew each other well.
15. On penetration the appellant and the complainant testified that they had sex while cohabiting. This was therefore an admitted fact, and admitted facts require no proof.

The age of the complainant

16. It is the Appellant's contention that the age of the Complainant's was not proved beyond reasonable doubt. A birth certificate was produced [PExb. 1]. It showed that the complainant was born on 20/2/2003 and it follows that as at the time of the incident, which is placed between 20th January 2020 and 15th February 2002 the complainant was 17 years.
17. The year of birth was contested by both the complainant and the appellant. The complainant told the court that the date in the birth certificate was false. She insisted that in January, 2020 she was 21 years. The appellant also stated that the age stated in the P3 form was in correct. The appellant produced an aged assessment report done after the case had begun and which report indicated that the complainant was between 19-20 years.
18. Prove of age is critical in cases of defilement because the prescribed sentence is dependent on age of the victim. In this case, the prosecution produced a birth certificate showing that the complainant was born in 2003. Upon taking plea an assessment was done presumably the request of the appellant as he is the one who produced it [Dxb. 1].
19. It is trite law that age may be proved by a birth certificate, baptismal card, age assessment report or even the oral evidence of the child or that of the parent or guardian. In the case *Mwalongo Chichoro Mwanjembe v Republic*, as cited in *Edwin Nyambaso Onsongo v Republic* [2016] eKRL the court held:the question of proof of age has finally been settled by a recent decisions of this court to the effect that it can be proved by documentary evidence such as a Birth Certificate, Baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof..... We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable. [Emphasis added]
20. According to the evidence of the complainant's mother the, birth certificate was issued in 2016, when the complainant was joining high school. it is a public document which required no production by the maker. Birth certificate are ordinarily issued on the basis of birth Notification. In my view, and duly



guided by the decision in Mwalongo’s case [supra] the particulars of the birth certificate are credible and hence reliable. I have further taken this position considering that the Age assessment report is a matter of opinion, which opinion was not subjected to cross- examination as the maker of the document was not called to defend it.

21. Another issue in contest is the Appellants plea that he believed that the complainant was no longer a child. It is a defence under the Act if the Accused proves that the child made him to believe that she was an Adult.section 8 [5] & [6] provides as follows:
 - [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.
22. In the case of Jonda v Republic [2023] KECA 374 [KLR] the court of appeal discussed the import of sub- section [5] and [6] . The court took the view that the deception by the victim ,and the steps taken by the accused to ascertain the age of the victim, are conjunctive. That is to say the accuse must demonstrate that he was deceived, then further demonstrate the investigations he undertook on his own to ascertain the age of the victim. That the deception by the complainant is a subjective test, while the investigation by the accused is an objective one.
23. On the subjective test, the appellant has testified that the that the complainant told him she was born in 1999. This placed the complainant at 21 years at the time of the incident. This position is confirmed by the complainant in her testimony when she told the court that she was 21 years at the time. In my view therefore the appellant satisfied the subjective test.
24. On the objective test, one may consider his visit to the complainant’s home as such. However it was the appellant’s testimony that he met the mother during the visit but he did not inquire from her about the age of the complainant. I have also looked at the mother’s testimony, and noted that Appellant did not cross- examine her about the alleged visit. Further the complainant was in form four at the time a fact which the appellant knew. If he was keen in his alleged investigation, should have alerted him to the possibility that the complainant was under- age.
25. Am not satisfied that the Appellant satisfied the objective test and therefore the defence of section 8[5] of the Act is not available to him
26. Both the complaint and the appellant told the court they were living together in Bomet at the time of the trial and already had a child. However, this has no bearing on the commission of the offence in the year 2020.
27. The appellant has strongly argued about the complaint’s misrepresentation of her of adult status and the law’s apparent blindness to such deceptions by young girls. However that is why the same law places a duty on the Accused to carry his own independent investigation. In the absence of the objective test referred to herein before, what would stop every perpetrator from pleading “deception “ from the victim
28. The appellant has further taken issue with the provision of *sexual offences Act* on defilement. His argument is that apart from proving age, identification and penetration, factors to be consider should



include whether the complainant was forced or threatened; whether she was taken advantage of, or whether the two have been in sexual relationship.

29. However, this is not a constitutional petition . Thus the duty of the court in this case is to interpret the law ,not to rewrite it. One must obey the law “as is”. The appellant cannot prove his innocence by faulting the law. This argument is therefore misplaced
30. In conclusion I am satisfied that appellant’s conviction was safe.

Sentence

31. The appellant was sentenced to 15 years imprisonment under Section 18 [4] of the act. The sentence is therefore founded in law and this court has no reason to interfere with it.
32. In the end the entire Appeal fails and it is hereby dismissed.

DATED, SIGNED, AND DELIVERED AT ISIOLO THIS 17TH DAY OF JULY 2025.

SOPHIE CHIRCHIR

JUDGE.

In the presence of :

Roba Katelo- Court Assistant

Geoffrey Kosgei- The Appellant

Mr. Ngetich for the Respondent.

