



REPUBLIC OF KENYA



**Korir v Republic (Criminal Appeal E052 of 2023)  
[2025] KEHC 12707 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12707 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CRIMINAL APPEAL E052 OF 2023  
JK NG'ARNG'AR, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**ISAACK KORIR ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case Number E040 of 2023 by Hon. Rabera M.O. in the Principal Magistrate's Court in Bomet)*

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. The particulars of the charge were that on 28<sup>th</sup> December 2019 at around 2000hrs at [Particulars Withheld], Ndaraweta location of Bomet County, he intentionally caused his penis to penetrate the vagina of S.C, a child aged 16 years.
2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that 28<sup>th</sup> December 2019 at around 2000hrs at [Particulars Withheld], Ndaraweta location of Bomet County, he intentionally touched the vagina of S.C, a child aged 16 years with his penis.
3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called four (4) witnesses in support of its case. The Appellant gave sworn testimony and did not call any witness.
4. In a Judgement dated 31<sup>st</sup> October 2023, the trial court convicted the Appellant and sentenced him to serve 10 years imprisonment.
5. Being aggrieved with the Judgment of the trial court, the Appellant, Gilbert Kosgei through an undated home-made Grounds of Appeal appealed against his conviction and sentence.



6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusions. This was set out by the Court of Appeal in *Kiilu & Another vs. Republic* (2005)1 KLR 174.
7. I proceed to consider the case before the trial court and the parties' submissions in the succeeding paragraphs.

#### **The Prosecution's/Respondent's case.**

8. It was the Prosecution's case that the Appellant defiled S.C (PW1) on 28<sup>th</sup> December 2019. PW1 testified that the Appellant was her boyfriend and that on the material day she had sexual intercourse with the Appellant. That she became pregnant and gave birth to a baby called F.C. PW1 further testified that the Appellant did not force her to engage in sexual intercourse.
9. JCS (PW2) who was the victim's mother testified that she reported the matter to the police when the Appellant refused to support her in raising the baby F.C.
10. Polycarp Lutta Kweyu (PW4) who was the Government Chemist testified that he conducted a DNA test on baby F.C and the Appellant and his finding was that the Appellant was the father of F.C.
11. At the time of writing this Judgement, the Respondent had not filed their written submissions despite being directed by this court to do so on 22<sup>nd</sup> May 2025.

#### **The Appellant's Defence**

12. The Appellant, Isaack Korir (DW1) testified that he knew the victim (PW1). DW1 further testified that sometime in August 2019, PW1 texted him and informed him that she missed engaging in sexual intercourse.
13. It was the Appellant's case that after they engaged in sexual intercourse, they begun a romantic relationship and continued having sex. It was the Appellant's further case that the victim's mother (PW2) came to his home and said the PW1 was pregnant. That she spoke to his parents and wanted him to take care of the child.
14. The Appellant stated that his parents agreed to take care of the child. That around they year 2021, the baby fell ill and he was not financially capable of taking care of the child. The Appellant further testified that his father gave him money for the baby's treatment.
15. It was the Appellant's case that he had no reason to believe that the victim was underage and a school going. It was his further case that the victim had told him that she was over 18 years but had not obtained her National Identity Card.
16. The Appellant testified that he did not oppose the DNA results that were produced in court.
17. In his written submissions filed on 12<sup>th</sup> May 2025, the Appellant submitted that the Appellant deceived him that she was over 18 years of age and did not inform him that she was a school going student. The Appellant further submitted that the trial court did not consider his age (19 years old). That he loved the victim and wanted to marry her.
18. It was the Appellant's submission that the matter was only reported to the police after he failed to cater for his sick child due to financial constraints. It was the Appellant's further submission that the victim's mother (PW2) was aware of their relationship as the victim used to sleep in his home without question.



19. I have gone through and considered the trial court's proceedings; the undated Grounds of Appeal and the Appellant's written submissions filed on 12<sup>th</sup> May 2025. The following issues arise for my determination: -
- i. Whether the Prosecution proved its case beyond reasonable doubt.
  - ii. Whether the defence under section 8(5) of the *Sexual Offences Act* was available to the Appellant.
  - iii. Whether the sentence preferred against the Appellant was just and fair.

**Whether the Prosecution proved its case beyond reasonable doubt.**

20. It is trite law that for the offence of defilement to be established, the age of the victim, penetration and positive identification or recognition of the offender have to be proved.
21. Regarding age, the victim (PW1) testified that she was born 21<sup>st</sup> November 2004. Her mother JCS (PW2) also testified that PW1 was born on 21<sup>st</sup> November 2004. No. 233716 PC Emmy Chepkirui (PW3) who was the Investigating Officer produced a Birth Certificate as P. Exh 1. I have looked at the Birth Certificate and it shows that PW1 was born on 21<sup>st</sup> November 2004. The Appellant did not challenge the production or the veracity of the Birth Certificate. It is therefore my finding that S.C (PW1) was aged 15 years old at the time of the commission of the offence.
22. With regard to the issue of identification, the victim (PW1) testified that the Appellant was her boyfriend with whom they engaged in sexual intercourse regularly. This fact was confirmed by the Appellant in his testimony. Further, the Appellant acknowledged that he was the father of their baby. It was therefore an undisputed fact that the Appellant and the victim were not strangers and were well known to each other. The positive identification of the Appellant was overwhelming and free from any doubt.
23. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person.
24. Penetration can be proved through the evidence of the victim corroborated by medical evidence. It should however be noted that if the medical evidence is insufficient, courts can convict solely on the evidence of a victim provided they believe the testimony of the victim and record such reasons.
25. In the present case, the issue of penetration was not disputed. The victim and the Appellant admitted to engaging in sexual intercourse which led to a pregnancy and eventual birth of F.C. Further, the Appellant did not deny paternity and admitted to being the father of F.C. Without belabouring much on this issue, it is my finding that the ingredient of penetration was proved. It is my further finding that the Prosecution proved all the ingredients of the offence.

**Whether the defence under section 8(5) of the *Sexual Offences Act* was available to the Appellant.**

26. Section 8(5) of the *Sexual Offences Act* provides: -
- 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.



27. Section 8(6) of the *Sexual Offences Act* provides: -

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. (Emphasis mine)

28. The Court of Appeal in *Jonda v Republic* [2023] KECA 374 (KLR) held: -

“This Court (Nambuye, Musinga, & Kiage JJA) held as follows in *Eliud Waweru Wambui v R* (2019) eKLR on the application of the defence in section 8 (5):

“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 sub-sections are to make sense.” Section 8(6) in this regard provides as follows:

“(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.”

Our view is that section 8(5) requires a conjunctive as opposed to a disjunctive reading and application, for the reasons that firstly, the word

“and” in its ordinary usage is as a conjunction, connecting words, phrases and sentences that are to be taken jointly, and secondly, a departure from this ordinary meaning will have to be required by the purpose of the statute. Therefore, starting with the ordinary meaning and construction of section 8(5), it is our view that the defence therein is available only if, firstly a child makes a deceptive representation that they are an adult that leads to such a subjective belief on the part of the accused person; and, secondly, the accused person demonstrates that reasonable circumstances existed that made him or her form an objective belief that the child was an adult. It is also our view that the absence of the term “reasonable” in section 8(5)(a) and its presence in section 8(5)(b), and the linkage of the two paragraphs by the conjunction “and”, imports the co-existence of both a subjective and an objective element of the defence that both require to be demonstrated by an accused person.

In addition, a disjunctive application and interpretation of the word “and” of section 8(5) in our view could not have been intended by the legislature, as it would result in the absurd, unjust and disproportionate situation where the defence is made available to an accused person where a child holds himself or herself out as an adult, even when all surrounding circumstances clearly demonstrate otherwise, and would clearly be contrary to the purpose of the *Sexual Offences Act* and the mischief the section 8 of the Act seeks to address, which is the protection of children from defilement. Lastly, we also hold the view that the need and rationale for section 8(6) was not to place any qualifications on sub-section (5), but on the contrary, to place an obligation on an accused person to demonstrate that reasonable grounds existed to form a belief that a child was of age, for the defence in section 8(5) to be available.”



29. I concur with Muchemi J. in *Peter Ngare Gatari v Republic* [2019] KEHC 3248 (KLR) where she held: -

“The question whether the accused raised sufficient evidence to raise the issue is left to the court to determine. Once the accused does this it is for the prosecution to prove beyond reasonable doubt, that the complainant did not consent and that the accused did not reasonably believe that the complainant consented.”

30. I have looked at the Appellant’s defence. He testified that the victim (PW1) texted him that she had missed sexual intercourse and this led them to engaging in the act severally before she (PW1) became pregnant. From the Appellant’s testimony, it was clear that the victim’s mother (PW2) wanted this issue to be handled amicably hence her visit to the Appellant’s home to discuss the pregnancy with the Appellant’s parents. The Appellant testified that PW2 only reported the matter to the police after he failed to cater for the baby’s medical needs. I have looked at PW2’s testimony and she confirmed that she spoke to the Appellant’s parents and reported the matter to the police after the Appellant had failed to support her in treating the baby.

31. It was the Appellant’s defence that in their earlier discussions with the victim (PW1), the victim told him that she was above 18 years but had not obtained her National Identity Card. This fact was not controverted upon cross examination. I have looked at the victim’s (PW1) testimony and she testified that the Appellant did not force her to engage in sexual intercourse. When the victim was cross examined, she testified that she never told the Appellant that she was a student and the Appellant did not know that she attended school. She further testified upon cross examination that the Appellant did not know that she was aged below 18 years and that she did not want the Appellant to be imprisoned.

32. From the above, it is clear to me that the victim’ there existed reasonable circumstances that led the Appellant to believe that the victim was an adult. The victim’s conduct from the onset would have led a reasonable man to believe that she was of age and knew fully well what she was doing. The Appellant demonstrated the step he took to determine whether the victim was under 18 years of age and this was corroborated by the victim’s testimony and cross examination.

33. 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. (Empasis mine)

34. Flowing from the above, the Appellant’s defence created a doubt as to his guilt for the reasons explained above.

35. In the end, it is my finding that section 8(5) of the *Sexual Offences Act* applies in this case. That being so, this Appeal succeeds. I thus allow the Appeal, quash the conviction and set aside the sentence.



36. I hereby order that the appellant be set at liberty unless otherwise lawfully held.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 18<sup>TH</sup>  
DAY OF SEPTEMBER, 2025.**

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**HON. JULIUS K. NG'ARNG'AR**  
**JUDGE**

Judgement delivered in the presence of:

Siele/Susan (Court Assistants)

Appellant present in person

**Koech for the Republic**

 CRIMINAL APPEAL NO. E052 OF 2023 JUDGEMENT

