



**Bomazi v Republic (Criminal Appeal E016 of 2022)
[2024] KEHC 25 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 25 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E016 OF 2022
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

JAJI BORA BOMAZI APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO. E032 of 2020 of the Principal Magistrate's Court at Kwale by Hon. Christine Kemuma Auka – Resident Magistrate)

JUDGMENT

1. Jaji Bora Bomazi, 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](#) No. 3 of 2006.
2. The particulars of the offence are that on the 26th day of November 2020, at Matuga sub-county within Kwale County, intentionally and unlawfully caused his penis to penetrate the anus of M.P., a child aged 16 years.
3. The appellant was sentenced to sixteen years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. He raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact for not appreciating that the prosecution case was not proved beyond reasonable doubt.
 - b. That the learned trial magistrate erred in law and fact for not noticing that the medical evidence did not corroborate the complainant's evidence.
 - c. That the learned trial magistrate erred in law and fact for not considering that a crucial witness was not summoned in court.



- d. That the learned trial magistrate erred in law and fact for dismissing the defence without any legal basis.
4. The appeal was opposed by the state through Mr. Yassir Mohammed Yusuf learned counsel. He contended that the prosecution proved all the ingredients of the offence to the required standards. He further argued that the sentence was proper and legal.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
6. To sustain a conviction for the offence of defilement, the prosecution has to prove the following ingredients:
- a. Whether there was penetration;
 - b. Evidence must show that the accused is the perpetrator; and
 - c. The age of the victim must be below eighteen years.

In the case of *Fappyton Mutuku Ngui v Republic* [2012] eKLR Joel Ngugi J. said:

Going by this definition of defilement, I agree with Mr. Mwenda on the issues which 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 I will endeavour to find if they are proven.

7. This is a very interesting case. Though the appellant claims that the prosecution did not prove its case to the required standards, I find that this is not so. Shortly you will be able to see why I describe it so.
8. A copy of the birth certificate of M.P. was produced as an exhibit. It indicates that the complainant was born on the 13th day of September 2004. At the time of the offence, she was sixteen years old. Section 8 (4) of the *Sexual Offences Act* provides:
- A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

The Prosecution therefore proved the age of the Complainant.

9. The complainant testified that she had sexual liaison severally with the appellant for they loved each other. The appellant on his part admitted that he was staying with the complainant as his wife. As a result of their sexual liaison, the complainant became pregnant.
10. The appellant in his defence contended that the complainant told him that she was eighteen years old. 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.
11. The trial magistrate in her judgment did not address this defence by the appellant. She ought to have indicated whether any reasonable person could have been persuaded to believe that the complainant



was an adult. Since she interacted with the complainant it was incumbent upon her to record her stature and general appearance. The learned magistrate did not address this defence at all. The failure to do so is fatal to the prosecution case. I have no benefit in considering whether this defence was plausible or not.

12. The conviction was not safe. The conviction is quashed and the sentence is set aside. The appellant is at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT MOMBASA THIS 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

