



**Dziwe v Republic (Criminal Appeal E011 of 2022)
[2024] KEHC 21 (KLR) (12 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 21 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E011 OF 2022
KW KIARIE, J
JANUARY 12, 2024**

BETWEEN

CHANIRO MGANDI DZIWE APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O case No.126 of 2019 of the Senior Principal Magistrate's Court at Kwale by Hon. Christine Kemuma Auka– Resident Magistrate)

JUDGMENT

1. CMD, 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 diverse dates between April 2019 and December 2019, in Kinango sub-county within Kwale County, intentionally and unlawfully caused his penis to penetrate the vagina of K.K., a child aged 16 years.
3. The appellant was sentenced to fifteen 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 by not considering that there were contradictions and discrepancies in the prosecution case.
 - b) That the learned trial magistrate erred in law and fact by failing to consider that the prosecution did not prove its case beyond reasonable doubt.
 - c) That the learned trial magistrate erred in law and fact by failing to consider doctor's evidence did not collaborate with the complainant's evidence.
 - d) That the learned trial magistrate erred in law and fact by failing to consider the defence.



- e) That the learned trial magistrate erred in law and fact by failing to consider the appellant's mitigation.
4. The appeal was opposed by the state through M/s. Nyawinda Kernaël learned counsel. She contended that the prosecution proved all the ingredients of the offence to the required standards.
5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. 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 vs. 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 Ngugi vs. 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. K.K., (PW1) testified that she had been a girlfriend of the appellant since April 2019. They both went to the same school. She referred to the appellant as her husband.
8. The complainant was examined by Titus Kamau (PW3), a clinical officer on December 30th, 2019, and found to be expectant. After her delivery, a DNA test confirmed that there was a 99.99+% chance that the appellant was the father of the complainant's child. This therefore confirmed penetration.
9. The complainant did not have a certificate of birth but her age was medically assessed at 16 years. The prosecution therefore proved the age of the complainant. 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.
10. The prosecution adduced evidence that proved its case against the appellant beyond any reasonable doubt.
11. This is a case that calls for a different approach other than applying the sentence mechanically. The complainant and the appellant were in the same school and am persuaded to believe that their age difference was negligible, the appellant having attained the age of majority before the complainant notwithstanding.
12. At the time the appellant tendered his defence he said he was 21 years old. He said he was in class eight at [] Primary School. This was not disputed and renders credence to the complainant's assertion that they were schoolmates. This would mean at the time of the offence he was 19 years old.



13. From the foregoing, I set aside the sentence imposed by the learned trial magistrate and substitute with a probation order for three years.

DELIVERED AND SIGNED AT MOMBASA THIS 12TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

