



**Republic v Muriithi (Criminal Appeal E008 of 2023)  
[2024] KEHC 5717 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5717 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E008 OF 2023  
LM NJUGUNA, J  
MAY 22, 2024**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**BONIFACE GITONGA MURIITHI ..... RESPONDENT**

*(Appeal arising from the decision of Hon. J.O. Otieno (SRM) in the Magistrate's Court at Embu MCSO No. E037 of 2021 delivered on 27<sup>th</sup> April 2023)*

**JUDGMENT**

1. The appellant has filed a petition of appeal dated 11<sup>th</sup> May 2023 seeking that the appeal be allowed and the respondent be convicted and sentenced accordingly. The appeal is premised on grounds that:
  - a. The trial magistrate erred in law and fact by not convicting the respondent even after finding that the ingredients of the offence of defilement had been proved beyond reasonable doubt against the respondent; and
  - b. The trial magistrate erred in law and fact by finding that the complainant had mutual sexual relationship with the respondent yet the complainant was a minor at the time and therefore incapable of consenting to any sexual act.
2. The respondent was charged with the offence of defilement contrary to section 8(1) as read together with section 8(4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence are that, during the month of March 2021 in Embu North sub-county within Embu County, the respondent intentionally caused his penis to penetrate the vagina of LKG a child aged 16 years old. He also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006, whose particulars are that during the month of March 2021 in Embu North sub-county within Embu County, the respondent, intentionally and unlawfully touched the vagina of LKG, a child of 16 years with his penis.



3. The respondent pleaded not guilty and a plea of not guilty was duly entered. The prosecution called witnesses in support of its case.
4. PW1 was the complainant, who stated that sometime in 2020, the respondent invited her and others to his church where he held a thanksgiving service. That after the service, he invited her and a few others to his house for some refreshments at around 5PM and he asked for her phone number. That he started contacting her and asking her to be his lover but she declined, telling him that she is a student. That she fell pregnant and DNA evidence proved that he was the father of the child but he refused to take responsibility, prompting her parents to go to court. On cross-examination, she stated that the first time they had sex was outside a tea farm and they occasionally met at the same place for the same purpose. That she understood the consequences of those actions but the respondent was using a love potion on her.
5. PW2 was Dr. Dennis Mwenda of Embu Level 5 Hospital who stated that on the 27<sup>th</sup> of August, 2021 the complainant was sent for medical examination following an alleged case of defilement. That she had been previously examined and sent to the prenatal clinic since she was 25 weeks pregnant. That upon examination, he observed that the hymen was perforated and had an annular shape with healed wounds which he classified as grievous harm. He later directed that a DNA test be done to confirm paternity.
6. PW3 was Jane Gichuku, PW1's mother, who stated that PW1 was born on 27<sup>th</sup> August 2004 and that at the material time, PW1 was a student. That PW1 revealed to a friend that she was pregnant and that the respondent was responsible for it. On cross-examination, she stated that the respondent went to her home but her husband told him to bring his parents and elders which he did but the respondent said he had no money to maintain the child.
7. PW4 was the investigating officer, PC Rose Wanguru of Karao Police Post. She stated that the case was reported at the police post on 21<sup>st</sup> August 2021 and the respondent was identified as the assailant. That she collected swab samples from the respondent for DNA testing and took them to Embu Level 5 Hospital. That the DNA results revealed that the respondent was the father of the complainant's child. She produced the DNA report as evidence.
8. After the close of the prosecution's case, the court found that the respondent had a case to answer and placed him on his defense.
9. DW1, the respondent, stated that he met the complainant through a thanksgiving service he had in church in December 2020. That they began talking as they still do todate and that she fell pregnant. That he approached her father about the issue but he told him that the issue needed to be addressed in the presence of more people. That he returned with a pastor, his wife and village elders and PW3 demanded money for clinic and he gave them Kshs 1,500/= . That they scheduled another meeting but the complainant's father changed the venue to the police camp where the respondent was arrested. That the complainant's major issue is maintenance for the child.
10. DW2 was Ephantus Njeru Njiru who stated that on 07<sup>th</sup> August 2021, DW1 asked him to accompany him to the complainant's home for a meeting where he revealed that he was dating her. That the complainant's father asked for another meeting but he changed the venue to the police station where he decided to report the matter as defilement, to their surprise. That they had a meeting with the OCS and elders and the matter was escalated. On cross-examination, he stated that he did not know that the complainant was a student and that the respondent revealed that he had impregnated her.
11. DW3, Julieta Wandera, the respondent's mother, stated that the respondent told her that he had a girlfriend and she advised him that they should go to meet the girl's parents. That instead of the planned



- meeting, the issue was escalated to the police. On cross-examination, she stated that she did not know that the girl was a student.
12. DW4 was John Nyaga who stated that he was one of the elders who were to meet the complainant's parents but he delayed a bit. That he later learned that the respondent had been arrested.
  13. After close of the defense case, the trial court found that all the elements of the offence were proved by the appellant. However, the trial magistrate stated that regardless of the fact that the complainant was a minor, the issue of her age was not a factor that her parents raised. That the complainant herself stated that she was the respondent's lover even though she had rejected his advances before. The court deduced that the respondent had no way of knowing that the complainant was a minor before engaging in sexual relations with her.
  14. She relied on the case of *Mohamed Billow Isaack v Republic* (2019) eKLR and stated that the offence of defilement cannot be limited to age and penetration and that the circumstances of the offence must also be considered. The trial court found that the sexual encounter was not forceful since there is no indication that she was forced into the act. The respondent was acquitted on those grounds.
  15. In this appeal, the court directed the parties to file their written submissions but only the appellant complied.
  16. The appellant placed reliance on the cases of *DS. v Republic* (2022) eKLR and *CKW v Attorney General & another* (2014) eKLR where the courts held that an accused person should be convicted once the elements of defilement are proved. That there is sufficient proof to show that there was penial penetration on several occasions, which led to the complainant getting pregnant. That the identity of the respondent is not in question and even DNA evidence showed that he is the father of the complainant's child. It submitted that the trial magistrate erred in relying on the case of *Mohamed Billow Isaack v Republic* (2019) eKLR.
  17. Reliance was placed on the provisions of section 42 of the *Sexual Offences Act* which states that consent can only be given by persons who have capacity to consent and children are not in that category. Further reliance was placed on the case of *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* (CCT 12/13) [2013] ZACC 35 where the court held that limitation of fundamental freedoms for children in particular cases is meant to protect them.
  18. From the foregoing, the issue for determination is whether the trial court erred in acquitting the respondent given the circumstances.
  19. It is the role of the first appellate court to review the evidence at trial and reach its own conclusion. These were the sentiments of the Court of Appeal in the case of *Okeno v Republic* [1972] EA 32 I agree with the court when it held:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”
  20. Under section 8(1) of the *Sexual Offences Act*, the prosecution had the burden of proving the elements of defilement beyond reasonable doubt. These elements are:



- a. The age of the complainant- that the complainant was a child;
  - b. Penetration occurred; and
  - c. The perpetrator was positively identified.
21. According to the birth certificate of the victim as produced by PW3, the complainant was 16 years old at the time of the incident. In the case of *Edwin Nyambogo Onsongo v Republic* (2016) eKLR the Court of Appeal held that:
- “ ... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, 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 preferred in proof of the victim’s age, it has to be credible and reliable.”
22. On the element of penetration, PW1 testified that the respondent invited her among other people to his house for refreshments where he asked for her contacts. She stated that he reached out to tell her that he is interested in being her lover but she refused. That later on she became pregnant as they used to meet outside the tea plantation to have sex occasionally. PW2 testified that PW1’s hymen was perforated and annular in shape and she had healed wounds. That the complainant was 25 weeks pregnant at the time of examination. PW4 produced a DNA report showing that the respondent was the father of the complainant’s child. DW1 also stated that the complainant agreed to date him and she became pregnant. This is sufficient proof of penetration. On identification of the perpetrator, PW1, PW3 and DW1 all testified that indeed the respondent was sexually involved with the complainant.
23. In her judgement, the trial magistrate inferred that the respondent had no way of knowing that the complainant was a minor even though the respondent himself did not raise this defense. This defense is provided for under Section 8(5) of the *Sexual Offences Act* 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.”
24. If the trial court was to go by this, the defense ought to have been pleaded by the respondent himself who would also bear the burden to prove that the minor deceived him into believing that she was not a minor and that he believed as much. In this case, there is no such evidence adduced. The respondent merely stated that the complainant agreed to date him and she became pregnant. Therefore, the trial magistrate erred in considering this since it is an extraneous factor that is distant from the facts and evidence.
25. The trial court also stated that the totality of the circumstances should be considered and that in this case, the complainant did not refuse to have sexual relations with the respondent. In my view, the trial court inferred that the complainant, who was minor at the time of the offence, consented to sexual relations. It is trite that a minor does not have capacity to consent to sex under Kenyan Laws. Under the *Sexual Offences Act*, this can be looked at differently if the defense under Section 8(5) is allowed, where



the minor behaved in such a manner that the respondent believed that she was not a minor. However, this has been determined hereinbefore and found that there was no evidence to that effect. As rightly argued by the appellant, section 42 of the Sexual Offences Act provides that a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice. I reiterate that a minor does not have capacity to consent to sex.

26. That being said, having considered the evidence adduced at trial and the petition of appeal, this court finds that the offence of defilement contrary to section 8(1) as read together with section 8(4) of the Sexual Offences Act No 3 of 2006 has been proved beyond reasonable doubt and the respondent is hereby convicted accordingly. Consequently, the appeal is hereby allowed and the judgment of the trial court acquitting the respondent is hereby set aside.

27. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

