



REPUBLIC OF KENYA



**Nzaro v Republic (Criminal Appeal E029 of 2021)  
[2023] KEHC 18559 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18559 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARSEN  
CRIMINAL APPEAL E029 OF 2021**

**SM GITHINJI, J**

**JUNE 2, 2023**

**BETWEEN**

**CLINTON BARAKA NZARO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in S.O No. E001 of 2020 of the Senior Principal Magistrate's Court at Garsen Law Court-Hon. P.K Rotich, SPM dated 21st January 2021)*

**JUDGMENT**

CORAM: Hon. Justice S. M GITHINJI

Appellant in person

J. Mwangi for the State

1. The Appellant was charged with defilement contrary to Section 8(1) as read with subsection (4) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on 10<sup>th</sup> August 2020 in Tana delta Sub-county within Tana River County, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of FA a child aged 16 years.
2. The appellant also faced an alternative charge of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006.
3. The particulars of this offence being that on 10<sup>th</sup> august 2020 in Tana Delta sub-county within Tana River County, the appellant intentionally and unlawfully touched the vagina of FA, a child aged 16 years.



4. Upon trial, the appellant was found guilty of the offence in the main count and sentenced to serve 15 years imprisonment. Aggrieved by the sentence and the conviction, he lodged an appeal on the following grounds:
  1. That the learned trial magistrate erred in law and facts by not considering that section 8 (1) (4) of the *Sexual Offences Act* No. 3 of 2006 denies the judicial officers that are Magistrates and Judges discretion in regard to sentencing.
  2. That the learned trial magistrate erred in law and facts by not considering that there was no DNA conducted to prove the paternity of the child under Section 36 (1) of the *Sexual Offences Act*.
  3. That the learned trial magistrate erred in law and facts by considering that there were massive contradictions and invariances in the prosecution evidence.
5. In light of the above grounds, the appellant prays that the appeal be allowed, conviction quashed and sentence set aside.

### **Background**

6. The prosecution called to the stand four witnesses.
7. PW1 FA the complainant, after *voire dire* gave sworn testimony stating that she was 16 years old at the time of testifying and was living in [Particulars Withheld] with her parents. She stated that she was a pupil at [Particulars Withheld] primary school in class eight.
8. She testified that she knew the accused and had known him since the year 2019 since he lives in [Particulars Withheld], a three minutes' walk distance from her parents' house.
9. She further testified that on 10<sup>th</sup> August 2020 she was at home alone when she went to meet the accused at around 12.00 pm at his place. She found him alone and he requested to have sex with her to which she declined by telling him that she was on her periods. He then held her forcefully, removed her innerwear, his trouser and inner wear and had sexual intercourse with her. She thereafter returned home.
10. It was her testimony that in the month of September she missed her periods and upon carrying out a pregnancy test, she realized that she was pregnant. She then informed the accused who asked her to carry out an abortion to which she declined.
11. She stated that when her mum found out that she was pregnant, she reported the matter to the police station where she was called and disclosed to the officers the person who had impregnated her. She was then taken to Ngao Hospital where she was examined. Further, she miscarried in October 2020.
12. She also disclosed that she had had sex with the accused two times previously.
13. Upon cross examination by the accused, she stated that she had known him since October 2019 and it was him who had impregnated her.
14. PW2 PC John Ndungu, of force No. 24xxx attached to Hurara police station informed the court that he was the investigating officer in the case.
15. He testified that on 8<sup>th</sup> September 2020 while performing police duties at Hurara police post at 2.30 pm a girl aged 16 years, one FA accompanied by her sister in law MA reported that she



had been defiled by the accused. He booked the report in the OB and issued her with a P3 form to be filled at Ngao Hospital.

16. He testified that on 18/9/2020 he arrested the accused and had him charged with defilement. That the accused was not known before to him.
17. PW3 Daniel Innocent Mabombe a clinical officer at Ngao hospital testified that he had examined the minor and prepared an ultra sound report, medical lab results and age assessment report.
18. That the obstetric ultra sound confirmed that she was pregnant.
19. PW3 produced the p3 form, age assessment report, ultra sound report and laboratory results.
20. PW4 AK the mother of the minor stated that she lives in [Particulars Withheld]. She could not recall the month in which she noticed some changes in her daughter, which included moods and eating habits. She then conducted a pregnancy test that showed she was pregnant. Upon showing her the results, she started crying.
21. She then reported the matter at Hurara police station and was advised to take the complainant to the police station.
22. The prosecution closed its case and the trial magistrate ruled that the accused person had a case to answer and placed him on his defence. The accused elected to give unsworn testimony and called no other witness.
23. DW1- Clinton Baraka Nzaro testified that he is a mechanic and lives in Marafa. He stated that on 10<sup>th</sup> august 2020 he was at home in Marafa with his family. That the claim by the victim that he called her to his house and defiled her was false since he never had any relationship with her though she was known to him.

### **Submissions**

24. In a nutshell, I deduce the following from the appellant's submissions;

That the trial court ought to have considered his age at the time of sentencing as per the tenets in Francis Karioko Muruatetu Case.
25. Secondly, his argument is that the basis of the charges were the complainant's pregnancy to which no DNA was conducted to ascertain paternity of the foetus.
26. Thirdly, that there were inconsistencies on part of the prosecution witnesses that the trial court did not take into account.
27. The respondent submitted that the prosecution had proved its case beyond reasonable doubt.
28. It was submitted that the age of the complainant was proved through an age assessment form. That penetration had been proved by the complainant in her testimony and corroborated by PW 3 who ascertained that the complainant was 4 weeks pregnant. It was also submitted that the appellant had been positively identified by the complainant since he was known to her.

### **Analysis and Determination**

29. This being a first appeal, this court has a duty to revisit the evidence recorded by the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind



that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and should therefore make due allowance for that. This task of the 1<sup>st</sup> appellate Court on first appeal from a conviction or acquittal, was declared by the decision of the Court in *Pandya v R* [1957] EA 336 at pg. 337 where the Court held as follows:

“On first appeal from a conviction by a Judge or Magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and make its own decision thereon. It has the duty to rehear the case and reconsider the materials before the Judge or Magistrate with such other materials as it may have decided to admit. The appellate court must then make up its mind not disregarding the Judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or Magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant the court in differing from the Judge or Magistrate even on a question of fact turning on the credibility of witnesses whom the appellate Court has not seen. On second appeal it becomes a question of Law as to whether the first appellate Court in approaching its tasks, applied or failed to apply such principles.” ..... (See also *Shantilal M. Ruwala v R* [1957] EA 570)

30. The Appellant is accused of committing the offence of defilement. Section 8 (1) of [Sexual Offences Act](#) defines defilement as follows; -

“A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.”

31. Three ingredients must be proved by the prosecution beyond reasonable doubt for one to be convicted of defilement, which are:

1. Age of the Complainant (must be below 18 years).
2. Proof of penetration (of a sexual organ by a sexual organ)
3. Proof that the perpetrator of the offence was the Accused person.

See [Charles Wamukoya Karani v Republic](#) Criminal Appeal No.72 of 2013.

32. On the element of age, it is vital for two purposes; Firstly, to prove that the victim was minor; that is below 18 years. And secondly, for purposes of sentencing under section 8 (2), 8 (3) and 8 (4) of the [Sexual Offences Act](#). See [Moses Nato Rapheal v Republic](#) (2015) eKLR.

33. The age of the victim in sexual offences can be proved by the direct evidence of the victim, parents or guardian and any reliable document in relation to the same as well as by observation of the apparent age by the court. In [Thomas Mwambu Wenyi v Republic](#) (2017) eKLR cited with approval [Francis Omurumi v Uganda](#), Court of Appeal Criminal Appeal No. 2 of 2000 which held that:

“In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who would professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence



age may be proved by birth certificate, the victim's parents or guardian and by observation and common sense.”

34. In *Richard Wabome Chege v Republic* (2014) eKLR the Court of Appeal sitting in Nyeri pronounced itself thus:

“On the contention that the age of the complainant was not established, it is our considered view that age is not proved primarily by production of a birth certificate. PW2 the mother of the complainant testified that the complainant was 10 years old. What better evidence can one get than that of the mother who gave birth? It is our considered view that the age of the complainant was not only proved by PW2 but supportive evidence was given by PW3 who examined the complainant, and the complainant herself”

35. Turning to the present case, the complainant stated that she was sixteen years old at the time of testifying. There was no birth certificate nor document produced showing her age. Her date of birth was not given. The complainant's mother did not offer any information regarding the age of the complainant. What was however produced is an age assessment report. As regards the age assessment report which estimated the complainant's age at below 18, the same did not state the process used to approximate or evaluate the age of the victim and in my view such finding should be treated with caution. As pointed out in the case of *EK V Republic* (2018) eKLR, medical evidence would require a disclosure of the procedure applied to assess the age and the margin of error of such process to enable the court determine where to place it. It was further stated in that case that an incorrect medical age assessment, where a correct one is known to have a margin of error of 2 years, can if relied upon, give rise to grave consequences against an accused person charged under *Sexual Offence Act* number 3 of 2006.
36. In light of the foregoing, the actual age of the complainant remains uncertain. The Learned Trial Magistrate did not properly interrogate the issue of age during judgment.
37. There is a possibility where the complainant could have been 18 years old or even beyond that. The appellant deserved the benefit of doubt on this.
38. On the issue of penetration, the evidence of Pw-1 shows there was penetration. She said the appellant removed her inner wear, his trouser and pant before they engaged in sexual intercourse. She got pregnant as a result but later miscarried. These facts when weighed together shows that actually there was penetration. Her mother and the medical officer also ascertained that she was pregnant.
39. However irrespective of the prove of penetration, and the appellant as the culprit, given the reasonable doubt on the age of the victim, the appeal succeeds. The appellant is accordingly set free unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT GARSEN THIS 2<sup>ND</sup> DAY OF JUNE, 2022**

**S.M. GITHINJI**

**JUDGE**

**In the Presence of; -**

1. The Appellant in person
2. Mr Mwangi for the State

