



**Wayua v Republic (Criminal Appeal E040 of 2022)
[2023] KEHC 19577 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E040 OF 2022
GMA DULU, J
JULY 5, 2023**

BETWEEN

PETER MULI WAYUA APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Magistrate's Criminal Case No. E021 of 2021 at Taveta Law Courts delivered on 23rd March 2022 by Hon. C. L. Adisa (RM))

JUDGMENT

1. The appellant was charged in the Magistrate's Court with defilement contrary to section 8(1) as read with section 8(3) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of offence were that on June 3, 2021 at about 1900hours and on October 30, 2021 at about 1200hours in Taveta sub county unlawfully and intentionally caused his penis to penetrate the vagina of MJM a girl child aged 15 years.
2. In the alternative he was charged with committing an indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#), the particulars of which being that on the same dates, time and place, he unlawfully and intentionally touched the vagina of MJM a girl child aged 15 years with his penis.
3. He denied both charges. After a full trial, he was convicted of the main count of defilement and sentenced to 20 years imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds, which are basically on sentence:-
 1. Whether the mandatory sentence under section 8(3) of the [Sexual Offences Act](#) violated his right to fair trial guaranteed by article 50(2) of the [Constitution](#).
 2. Whether the mandatory nature of the sentence deprived the trial court of its legitimate power of discretion.



3. Whether the trial court had legitimate jurisdiction to consider his mitigation and impose a less severe penalty.
4. Whether the trial court considered the circumstances of the case.
5. That this court do consider his mitigation and reduce the sentence.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
6. Though the amended grounds of appeal appear to relate on sentence only, the appellant being a layman, and his initial grounds of appeal having been on conviction, and the Director of Public Prosecution having submitted on conviction, I will consider the conviction as well as the sentence.
7. This is a first appeal. As a first appellate court, I am bound to evaluate the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.
8. I have perused and considered the evidence on record. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony and was cross-examined by the prosecutor.
9. The elements of the offence of defilement for which the appellant was convicted are three. The first element is the age of the complainant who should be below 18 years. The second element is penetration of a sexual nature. The third element is the identity of the culprit.
10. The evidence on the age of the victim or complainant was that of PW1 MJ who stated that she was 15 years of age. She relied on her birth certificate which she identified in court. Her mother PW2 PW stated that PW1 was born on March 6, 2006 and was in class 8. The said birth certificate was produced as an exhibit by PW3 PC Ann Kimani of Taveta Police Station, and it was not contested.
11. In my view, the prosecution proved the age of the complainant (PW1) beyond any reasonable doubt.
12. With regard to sexual penetration, PW1 stated in her evidence in court that she was sexually penetrated. She was taken for medical examination and the evidence of PW4 Paterson Mwapindu the Clinical Officer at Taveta sub county Hospital on record was to the effect that PW1 was pregnant, though she aborted.
13. In my view, the prosecution proved beyond reasonable doubt that sexual penetration had occurred on the complainant PW1.
14. Was the appellant the culprit? PW1 says so, and stated that they have sexual intercourse a number of times. PW1 was also found and initially arrested at the house of the appellant together with the appellant who was later charged with this offence.
15. The appellant in his sworn defence denied any knowledge of PW1 and also denied any sexual relations with the complainant PW1.
16. With the evidence on record from both PW1 and PW2, who knew the appellant as well as a neighbour, and the electronic message seen by PW2 in PW1's phone from the appellant suggesting that PW1 should abort the pregnancy, and indeed the pregnancy being later aborted, I find that the prosecution proved beyond any reasonable doubt that the culprit of sexual intercourse with the complainant was the appellant.



17. Having found as above however, I find that the conduct of the complainant PW1 in proceeding to a man's house severally and voluntarily having sex with the man (the appellant) and refusing to disclose that fact to the mother PW2, even after being questioned, brings into play the defence in favour of the appellant provided under section 8(5) of the *Sexual Offences Act*.
18. Clearly in my view, with the facts and circumstances of this case on record before the trial court, any reasonable man would have been misled to believe that the complainant was an adult woman, as she behaved as such. She even stated in her evidence in court that in September 2021 she changed her school uniform and then visited the appellant at 9:00a.m for sexual intercourse.
19. I thus find that the defence under section 8(5) of the *Sexual Offences Act* applies to this case. I give the benefit of that defence to the appellant and on that account only, I will allow the appeal, quash the conviction and set aside the sentence.
20. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

Dated, signed and delivered this 5th day of July 2023 in open court at Voi.

GEORGE DULU

JUDGE

In the presence of:-

Appellant

Mr. Sirima for State

Mr. Otolo court assistant

