**Kazungu v Republic (Criminal Appeal E039 of 2022)**
**[2023] KEHC 24345 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24345 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL APPEAL E039 OF 2022**

**KW KIARIE, J**

**OCTOBER 24, 2023**

**BETWEEN**

**DELVIS KARISA KAZUNGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(From the original conviction and sentence in S.O. case NO. E015 of 2021 of the Principal Magistrate's Court at Kilifi by Hon. S.D. Sitati– Resident Magistrate)***

## JUDGMENT

1. Delvis Karisa Kazungu, the appellant herein, was convicted of the offence of defilement contrary to section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence are that on diverse dates between 1st day of August 2020 and 15th December 2020 in Ganze Sub County within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of SKK, a child aged 16 years.

3. The appellant was sentenced to ten (10) years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.

4. The appellant raised grounds of appeal as follows:

    a. That the learned trial court erred in law and fact by failing to see that the defence under section 8 (5) of the *Sexual Offence Act* was available to the appellant in the circumstances of his case.

    b. That the learned trial court magistrate erred in law and facts by failing to see that the prosecution evidence was marred with inconsistencies.

    c. That the learned trial court magistrate erred in law and facts by failing to consider the mitigation address and that the appellant was a first offender.

d. That the trial court erred in law and facts by failing to consider the pre-trial custody period in the sentence.

5. The appeal was opposed by the state through m/s Ngina Mutua, learned counsel. She contended that the prosecution proved their case to the required standards.

6. 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 own 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.

7. Section 8(1) of the *Sexual Offences Act* defines defilement in the following terms:

> A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> An offence of defilement, therefore, is established against an accused person when the prosecution has proved the following ingredients:
>
> a. That there was penetration of the complainant's genitalia;
>
> b. That the accused was the perpetrator; and
>
> c. The age of the complainant was below eighteen years.
>
> These ingredients were restated in *Fappyton Mutuku Ngui v Republic* [2012] eKLR as follows:
>
> > 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 that the prosecution must prove against an accused person.

8. The copy of the Certificate of Birth that was produced to support the age of the complainant was issued on the 11th day of December 2020. This was after the last possible date of the alleged offence. Ordinarily, this will not be an issue but where the circumstances are not clear as to what may have transpired, other supporting documents such as a baptismal card or a child immunization card may dispel any lingering doubts that one may entertain.

9. What is not in doubt is that there was penetration into the complainant's genitalia by a male for she was found to be pregnant. The only issue is who the culprit was.

10. According to the evidence of S.K.K (PW1) it was the appellant who defiled her albeit it was consensual. In her evidence, they had had a sexual relationship from March 2020 up to November 2020. This last time she had gone to the home of the appellant at 8 a.m. and returned home at 6 p.m. They had sex. She informed her parents that she was in the home of the appellant.

11. The version of the complainant's mother (PW2) is that the last incident was on 2nd December 2020. This was when the complainant was supposed to join her on the farm but she did not. When she enquired from her. She said she had gone to her grandmother's home. It was only after persisting that she said she had spent the day in the home of the appellant.

12. From the evidence, it is not clear when the complainant allegedly had the last encounter with the appellant. According to her evidence, this was in November presumably 2020 on an unspecified date. However, according to her mother's version, this was on 2nd December 2020.

13. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

> The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

14. It was not safe to act on the evidence of the complainant on the identity of the perpetrator without any other corroborative independent evidence. This is informed by the fact that the complainant first lied to her own mother as to where she had spent the day before implicating the appellant. The investigating officer did not discharge his duty to ensure that there was sufficient evidence to connect the appellant to the offence.

15. The proviso to section 124 of the *Evidence Act* states:

> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

16. The learned trial magistrate ought to have recorded why she believed the complainant in spite of the glaring contradictions in her evidence. The only comment she made was that she did not find anything on record to warrant the complainant to falsely implicate the appellant. The onus to adduce evidence on the relationship was on the prosecution and not the appellant.

17. The appellant contended that he ought to have benefitted under section 8 (5) of the *Sexual Offences Act*. This section 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.

18. At the trial, no evidence was adduced that the complainant had deceived the appellant into believing that she was an adult. Equally, no evidence was adduced that the appellant believed the appellant was an adult. This issue was not before the trial court for consideration. The appeal will not therefore turn on this issue.

19. From the foregoing analysis of the evidence on record, I find that the prosecution did not prove their case against the appellant to the required standards. I accordingly allow the appeal. The conviction is hereby quashed and the sentence set aside. The appellant is set at liberty unless if, otherwise, lawfully held.

**DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF OCTOBER 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**